83-1080

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IOWA POWER & LIGHT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Writ of Certiorari
to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
LYNN K. VORBRICH
Iowa Power and Light Company
666 Grand Avenue
Des Moines, Iowa 50309

CURTIS L. RITLAND
1100 Des Moines Building
Des Monies, Iowa 50307

JOHN M. CLEARY
*FREDERIC L. WOOD
NICHOLAS J. DiMICHAEL
914 Washington Building
1435 G Street, N.W.
Washington, D.C. 20005
Tel. (202) 783-1215

*Counsel of Record
for Petitioner

DATED: December 31, 1983

ABS Duplicators • 912 Seventeeth St. NW., Wash. DC • 298-5537

QUESTION PRESENTED

Whether the Interstate Commerce Commission has the authority to allow a tariff to be filed which has retroactive effect.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Page

Page

Statutes:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

IOWA POWER & LIGHT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Writ of Certiorari
to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Iowa Power and Light Company petitions for writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.[1]

---

[1]As required by Rules 21.1 and 28.1, the parents, affiliates, and subsidiaries of Iowa Power & Light Company are as follows: Iowa Resources Inc. (parent); Redlands, Inc., Enercor, Inc., Industries of Iowa Corp., Enserco, Inc., Middlewood Inc., Unitrain Inc., Iowa Computer Resources Inc., Westcon Inc. (affiliates); and Iowa Power Resources Inc. (subsidiary).

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, 1a-10a) is reported at 712 F.2d 1292. The decision of the Interstate Commerce Commission (Appendix B, 11a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1983 (Appendix C, 21a). The time for filing this petition was extended to December 31, 1983.[2] The jurisdiction of the Supreme Court of the United States is based on 28 U.S.C. §§1254(1) and 2350; this case falls within the jurisdictional provisions of these statutes because it involves a review of a final judgment (Appendix C, 21a) of the U.S. Court of Appeals for the Eighth Circuit which in turn was reviewing an order of the Interstate Commerce Commission under 28 U.S.C. §§2321 and 2341-2350.

STATUTES INVOLVED

The relevant statutes, 49 U.S.C. §10761 and §10762 (part of the Interstate Commerce Act) are set out in Appendix D, 22a-26a.

STATEMENT

1. Since February, 1978, petitioner Iowa Power and Light Company has operated for itself and six joint owners a coal-fired electric generating station at Council Bluffs, Iowa. Coal for the station is transported by rail from Belle Ayr, Wyoming to Council Bluffs by the Burlington Northern Railroad Company (BN, a respondent). The coal is transported by BN in unit-trains of cars owned by Iowa Power under tariffs filed with the Interstate Commerce Commission (I.C.C., also a respondent) under 49 U.S.C. §10761.

---

[2]By orders entered October 14 and November 28, 1983 by Circuit Justice Blackmun in No. A-266.

2. After a period of litigation from 1978 to 1981 which resulted in the issuance by the agency of a rate prescription order,[3] the BN filed a tariff establishing a rate at the level agreed to by Iowa Power and BN a few years before the movement began. Then, on October 9, 1981, BN filed with the I.C.C. a tariff increasing the rate, effective November 1, 1981. At the request of Iowa Power, the tariff was rejected by the I.C.C. because it was inconsistent with the prescription order. But a U.S. Court of Appeals held that the first rejection was not proper.[4]

3. On July 14, 1982, the BN filed another tariff, to become effective on one day's notice, publishing the same increased rate previously rejected, effective retroactively to November 1, 1981. Iowa Power requested the I.C.C. to reject the tariff because it was unlawfully retroactive and because it lacked the required statutory notice under 49 U.S.C. §10762(c)(3). The tariff was rejected only for the reason that it lacked the necessary 20-day notice. After the BN appealed the I.C.C. authorized the BN to file the tariff with the retroactive effective date of November 1, 1981 in a decision served December 23, 1982 (Appendix B, 11a-20a). However, BN was required to file the tariff with the statutory 20 days' notice. The I.C.C. believed that it was necessary to permit the retroactive tariff as an exercise of its "equitable power" in order to correct the situation created by the legal error of its 1981 rejection, relying in large measure on this Court's decision in *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223 (1965). (Appendix B, 13a) The I.C.C. also contended that its action did not conflict with the filed rate doctrine, as stated in this Court's decision in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1982). (Appendix B, 17a-18a).

---

[3]See *Incentive Rate on Coal, Belle Ayr, WY to Council Bluffs, IA*, 359 I.C.C. 201 (1978); *Unit-Train Rates on Coal – Burlington Northern Inc.*, 361 I.C.C. 655 (1979), *reversed*, 364 I.C.C. 186 (1980), *affirmed, Iowa Power and Light Company v. Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. den.* 455 U.S. 907 (1981).

[4]*Burlington Northern Railroad Company v. I.C.C.*, 679 F.2d 934 (D.C. Cir. 1982).

4. Shortly before that 1981 rejection, Iowa Power commenced a civil action against BN seeking necessary and appropriate relief to require the railroad to file a tariff with the rates agreed to before the generating station was placed in service.[5] In a judgment entered on December 23, 1983, the district court found that Iowa Power and BN had a valid and enforceable contract for the movement of coal, that BN should be enjoined from breaking that contract by filing a tariff not consistent with the contract, and that BN should refund to Iowa Power any money received under tariffs in excess of the rates specified in the tariff. However, BN has said it will appeal the district court decision.

5. Iowa Power sought judicial review of the I.C.C.'s decision to allow the BN to file the retroactive tariff under 28 U.S.C. §2321 and §§2341-2350 in the U.S. Court of Appeals for the Eighth Circuit.[6] While the judicial review proceedings were pending, the tariff containing the retroactive increase in rates was filed on January 21, 1983 by BN, and was allowed by the I.C.C. to go into effect on February 10, 1983, even though Iowa Power requested an investigation and suspension of the tariff under 49 U.S.C. §10707.[7] On July 12 Iowa Power paid BN $9,067,065.26 for the retroactive increase in rates (including interest) as applied to shipments between November 1, 1981 and February 9, 1983. However, the BN now takes the position that the refund award made by the district court in the contract case would only require BN to repay to Iowa Power $5,165,705.38 of the amount paid under the provisions of the retroactive tariff. Therefore, even if the district court decision is affirmed on appeal, a substantial amount remains at issue because of the court of appeals decision sought to be reviewed here.

---

[5] *Iowa Power and Light Co. v. Burlington Northern Railroad Co.* (Civil Action No. 81-526-B, S.D. Iowa, filed October 27, 1981).

[6] *Iowa Power and Light Co. v. United States* (No. 82-2550, filed December 28, 1982).

[7] *Retroactive Rate on Coal, Belle Ayr and Eagle Junction, WY to Council Bluffs, IA* (not reported, Suspension Case No. 70992, decided February 9, 1983).

6. That decision (App. 1a-10a) upheld the I.C.C.'s action. The court of appeals found that neither 49 U.S.C. §10761(a) nor the filed rate doctrine set out in this Court's decision in *Arkansas Louisiana Gas Co. v. Hall, supra,* barred the I.C.C.'s action. In addition, it found that under its view of this Court's decision in *United Gas Improvement Co. v. Callery, supra,* the I.C.C. had an inherent equitable authority to allow the retroactive tariff to be filed. Finally, the court of appeals found that the I.C.C.'s action was not arbitrary and capricious.

REASONS FOR GRANTING THE WRIT

The issues in this case are important, and involve substantial questions of federal law. The correctness of the I.C.C.'s action allowing the filing of a retroactive tariff under the Interstate Commerce Act and the filed rate doctrine is one of first impression in this Court. In addition, that action, as approved by the court of appeals, conflicts with applicable decisions of this court the inherent authority of an administrative agency to permit equitable exceptions to the filed rate doctrine. Finally, the court of appeals decision could be inconsistent with this Court's resolution of the issues in a case in which a writ of certiorari has already been granted.

1. Throughout the history of the Interstate Commerce Act, the I.C.C. has interpreted Section 10761[8] as not permitting retroactive tariffs. "Tariffs can not be given a retroactive effect; they can not be made to apply to conditions other than those existing upon the date when such tariffs become effective." *Through Routes and Through Rates,* 12 I.C.C. 163, 172 (1907). The rationale behind this interpretation was plainly stated by the I.C.C. in *Interstate Remedy Co. v. American Express Co.,* 16 I.C.C. 436, 438-439 (1909):

---

[8]And its predecessor statute, Section 6. The Act was recodified in 1978 without substantive change. Pub. L. 95-473, 92 Stat. 1337 (1978). See also H.R. Rep. No. 95-1395, 95th Cong. 2d. Sess. 4-5 (1978).

> "A schedule of rates extended by a carrier to the shipping public may be cancelled upon giving thirty days' notice in conformity with the law. But such cancellation is not to be construed as a withdrawal of all rights arising under such tariff to those who have availed themselves of its provisions prior to the date that such tariff dies. If this were not so, a shipper could never know whether rights and privileges extended by the carriers in their lawful tariffs would be available for the period fixed therein. It would be manifestly within a carrier's power to withdraw, by cancellation, at any time such rights as the tariffs offered at the time of shipment, thus leaving the shipper at the mercy of the carrier . . . . This is a view of the law which would be utterly impracticable and vicious in its effects. The shipper must know at the time of tender of shipment from the tariffs themselves what rate he must pay and what rights thereunder he may secure.
>
> • • •
>
> "The date of original shipment determines the rights, privileges, and obligations attaching to that shipment throughout its transportation; and this must be determined by the tariff in force upon that date."

The unavailability under the statute of the right to file retroactive tariffs has been recognized by this Court. In reliance on arguments made by the I.C.C. and the United States,[9] this Court stated that a federal court may not freeze a rate that a shipper is charged in a tariff filed by a railroad:

> "Because the reparations provisions do not apply to both shippers and carriers, losses suffered by the carriers cannot be recovered. Carriers are not adequately protected by their authority under §§10761 and 10762 to file a new rate. . . ."

---

[9]Brief for Federal Respondents in No. 81-1008, *Burlington Northern Inc. v. United States* (May, 1982), p. 39.

Burlington Northern Inc. v. United States, 459 U.S. 131, ____ 74 L. Ed. 2d 311, 321 (1982) *reh. den.* ____ U.S. ____, 75 L. Ed. 2d 471 (1983). After urging this Court to recognize the long-standing rule against retroactive tariffs, the I.C.C. reversed in this case its established interpretation of §10761 and §10762.

The court of appeals mistakenly failed to recognize the strict application required by this Court of the provisions of the statute directing observance of tariffs. *Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1924) and *Louisville & N.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915).[10] The court of appeals failed to appreciate that, unless the Act specifically authorizes the Commission to permit a variation from an effective tariff, it is without authority to do so. The statute could not be more explicit:

> "Except as provided in this subtitle, a carrier providing transportation or service . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect . . . ."

49 U.S.C. §10761(a). If the tariff is not "in effect" when the transportation is provided, no different rate may, then or thereafter be charged, "[e]xcept as provided" elsewhere in the Act.

Neither the court of appeals nor the I.C.C. relied on any provision of the Act that expressly authorizes the Commission to allow the BN to file a retroactive tariff. The court of appeals failed to recognize that the strict observance of tariffs, while it may have harsh results,[11] allows only such exceptions as the Congress permits.

---

[10]See also *Western Transportation Co. v. Wilson & Co., Inc.*, 682 F.2d 1227, 1229 (7th Cir. 1982).

[11]E.g., *Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336, 343-344, 352 (1982).

Congress has included several such statutory exceptions.[12] For example, under 49 U.S.C. §10707(d)(2), if the I.C.C. suspends the effectiveness of a tariff containing a proposed rail rate, and later finds the proposed rate to be lawful, the carrier may then collect from the ratepayers the difference between the effective tariff and the suspended tariff. The court of appeals, while conceding that §10707(d)(2) does not expressly authorize the I.C.C.'s action, concluded that its action was "not inconsistent." (Appendix 6a) But Congress has not authorized the Commission in the Act to allow retroactive tariffs, and until it does so, the Commission's action is beyond its statutory authority.

2. The I.C.C.'s action, as approved by the court of appeals, is also contrary to this Court's recent decision in *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571 (1981). This Court said there that the "filed rate doctrine" prevents an administrative agency from altering a rate retroactively. 453 U.S. at 578. This Court did note that there may be particular statutory exceptions to the filed rate doctrine.[13] But no such statutory exception has been relied on by either the I.C.C. or the court of appeals. The filed rate doctrine, created to support the tariff filing requirements of §10761, precludes any action by the I.C.C to permit the BN to replace retroactively the rate in effect between November 1, 1981 and February 9, 1983.[14] The court of appeals has misapplied the doctrine as it has been established by this Court.

---

[12]*E.g.,* 49 U.S.C. §11705 (reparations); §10707 (refunds); §10713 (contract rates); and §10505 (exempt traffic).

[13]At 453 U.S. 578, n. 8, it was noted that the FERC may have statutory authority to permit retroactive filing under 15 U.S.C. §717c(d). However, by its terms that statute seems to be limited to reducing the 30-day period for notice of tariff changes. Also see *Hall v. FERC,* 691 F.2d 1184 (5th Cir. 1982), *reh. den.* 700 F.2d 218 (1983), cert. den. ___ U.S. ___, 52 U.S.L.W. 3262 (1982).

[14]When the I.C.C. rejected the BN's tariff on October 30, 1981, by the terms of 49 U.S.C. §10762(e), it was void. (Before the 1978 recodification (*supra,* n. 8), the statute (Section 6(6)) explicitly stated that a rejected tariff was void and its use unlawful.) Therefore, the filed rate then in effect was the rate the BN had sought to replace with

The filed rate doctrine is applied across a broad spec- industries subject to federal regulatory authority. 453 U.S. at 577-578. *Arkansas Louisiana Gas, supra,* 453 U.S. at 577-578. However, the doctrine has its historical antecedents in cases interpreting the Interstate Commerce Act. *Id.* For example, in *Pennsylvania R. Co. v. International Coal Co.,* 230 U.S. 184, 196-197 (1913), this Court said:

> "The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; *nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper.* (February 4, 1887, 24 Stat. 379, c. 104, §2; March 2, 1889, 25 Stat. 855, c. 382, §6. *Armour Co. v. United States,* 209 U.S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."
>
> [emphasis added]

It should be noted that, except for the limited exception created by §10707(d)(2), there is still no provision in the Act allowing a carrier to obtain "reparations" when it is later found that the rate it collected from the shippers for transportation provided under the effective tariff needs to be increased. *Burlington Northern Inc. v. United States, supra.* Until Congress adds such a provision to the Act, the decision of the court of appeals allowing the I.C.C. to create such a remedy for the benefit of the BN or any other carrier is in error.

---

the rate in the rejected tariff. Of course, when the retroactive tariff was filed, Iowa Power was immediately required to, and did, pay the undercharges. Cf. *Baldwin v. Scott County Milling Co.,* 307 U.S. 478, 484-485 (1939).

In that regard, this case is very similar to another case cited by this Court in *Arkansas Louisiana Gas Co., supra,* 453 U.S. at 577. In *T.I.M.E. Inc. v. United States,* 359 U.S. 464 (1959), this court held that an implied remedy for reparations could not be created for motor carrier shippers when none was created by Congress. Relying on the filed rate doctrine as set out in *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.,* 341 U.S. 246 (1951), this Court noted the significant omission of any statutory reparations remedy against motor carriers. 359 U.S. at 468-472.

Moreover, the Court also barred the creation under a common law theory of a remedy which would permit "the I.C.C. to accomplish directly what Congress has not chosen to give it the authority to accomplish directly." 359 U.S. at 472-475.[13] Likewise, in this case, the court of appeals has permitted the Commission, by allowing the filing of retroactive railroad tariffs, to create a remedy which Congress had not included in the Act.

3. The court of appeals also incorrectly found that the I.C.C. possessed inherent authority to allow the retroactive tariff in order to correct an error. This Court long ago established that the I.C.C. lacks any inherent or general authority to change a rate in order to provide equitable relief. *Southern Pacific Co. v. I.C.C.,* 219 U.S. 433, 442-444, 451-452 (1911). This is an important corollary of the well-established principle that the effective tariff on file must be observed by both carrier and shipper, even when it contains manifestly unlawful rates, until the Commission properly exercises its statutory authority to change the tariff prospectively and award reparations. *Arizona Grocery*

---

[13]Congress later added what are now the provisions of 49 U.S.C. §11705(b)(3) and §11706(c)(2) to the Act, allowing shippers to recover reparations from motor carriers for past unreasonable rates. See Pub. L. 89-170, §6, 79 Stat. 648 (1965), adding what was then 49 U.S.C. §304a(2) and (5). Cf. *National Motor Ft. Traffic Ass'n. v. United States,* 268 F. Supp. 90 (D.D.C. 1967) and *Informal Procedure for Determining Reparation,* 335 I.C.C. 403 (1969).

Co. v. Atchison, T. & S. F. Ry. Co., 284 U.S. 370, 383-389 (1932) and *Davis v. Portland Seed Co.*, 264 U.S. 403, 424-426 (1924).

This Court's decision in *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229-230 (1965) was erroneously viewed by the court of appeals and the I.C.C. as supporting the existence of an inherent authority to permit retroactive tariffs. But both tribunals failed to recognize that the result in that case depended on the specific statutory authority given to the Federal Power Commission by Section 7 of the Natural Gas Act, 15 U.S.C. §717f, to attach conditions to certificates of public convenience and necessity issued to gas producers.[16] No such statutory authority exists here, as was expressly conceded by the court of appeals (Appendix 6a). As this Court's decision in *Arkansas Louisiana Gas v. Hall, supra,* plainly indicates, such statutory authority is essential to avoid the strict requirement for observance of the tariff in effect at the time the transportation or service is provided. And to the extent the court of appeals may have construed the holding of *United Gas Improvement Co. v. Callery Properties, supra,* as creating a non-statutory exception to the filed rate doctrine, then this novel theory alone requires review by this Court to settle the question of the scope of the doctrine.

4. This Court is presently considering three similar cases involving the application of the filed rate doctrine and the authority of the I.C.C. to retroactively modify tariffs filed with it. In No. 82-1643, *I.C.C. v. American Trucking Associations* (cert. granted, June 20, 1983, 51 U.S.L.W. 3901), this Court is reviewing the decision of the U.S. Court of Appeals for the Eleventh Circuit in *American Trucking Associations, Inc. v. United States*, 688 F.2d 1337, 1354-1356 (1982) that the I.C.C. may not retroactively reject a filed tariff after its effective date.

---

[16]See Section 7(e), 15 U.S.C. §717f(e) and 385 U.S. at 226, 229. See also *Panhandle Eastern P.L. Co. v. FERC*, 613 F.2d 1120, 1131-1132, at note 60 (D.C. Cir. 1979), *cert. den.* 449 U.S. 889 (1980).

In addition, petitions for writs of certiorari remain pending[17] to review a conflicting decision on the same issue from the Fifth Circuit in *Aberdeen R. R. Co. v. United States,* 682 F.2d 1092 (1982). The court of appeals decision in this present case could be in conflict with this Court's resolution of the issues in No. 82-1643. If the Court decides that the I.C.C. may not retroactively reject a filed and effective tariff, then neither can the I.C.C . permit the retroactive modification of a tariff such as was involved here. In either case, such retroactive action would create unforeseen consequences for shippers or carriers who relied on the effective tariff. This case thus involves the same type of substantial question as that which warranted review in No. 82-1643.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
LYNN K. VORBRICH
Iowa Power and Light Company
666 Grand Avenue
Des Moines, Iowa 50309

CURTIS L. RITLAND
1100 Des Moines Building
Des Monies, Iowa 50307

JOHN M. CLEARY
*FREDERIC L. WOOD
NICHOLAS J. DIMICHAEL
914 Washington Building
1435 G Street, N.W.
Washington, D.C. 20005
Tel. (202) 783-1215

*Counsel of Record
for Petitioner

DATED: December 31, 1983

[17]Nos. 82-707 and 82-804, filed October 22 and November 12, 1982, respectively.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-2550

Iowa Power and Light Company, Petitioner, v. United States of America and Interstate Commerce Commission, Respondents.	•	Petition for Review of Order of Interstate Commerce Commission.

Submitted: April 14, 1983

Filed: August 3, 1983

Before ARNOLD, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HENLEY, Senior Circuit Judge.

The major issue to be decided in this appeal is whether the Interstate Commerce Commission, consistent with its enabling legislation, can allow an incorrectly rejected tariff to take effect as of the date it would have been implemented but for the agency's prior erroneous rejection. Concluding that the Commission's action in the present case did not impermissibly conflict with the Interstate Commerce Act, and was not arbitrary or capricious, we affirm.

I

This appeal represents the latest chapter in an ongoing dispute between petitioner Iowa Power and Light Company (IPL), a public utility, and Burlington Northern Railroad Company (BN) concerning the shipment of coal from a Wyoming mine to the utility's generating plant at Council Bluffs, Iowa. Central to the controversy is a "letter of understanding" signed by the parties in connection with the coal shipments. This letter included, among other items, a base rate and rate escalation formula for rail transportation of coal from the Wyoming mine to Council Bluffs. Since February of 1978, when shipments began, IPL has received coal transported by BN; the utility is the only shipper involved in this particular transaction.

In the same year the coal shipments started, BN submitted a tariff to the ICC specifying a rate higher than that initially agreed upon by the parties in the letter of understanding. Following the filing of a petition and complaint by IPL, *see* 49 U.S.C. § 10707, the Commission determined that the rate specified in the letter of understanding was a just and reasonable maximum rate. Its prescription order, dated October 1, 1980, directed BN to file tariffs consistent with the parties' prior agreement. This court subsequently denied the railroad's petition for review, upholding the Commission's action.[1] *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

Thereafter, in October of 1981, BN submitted Supplement 4 to the tariff it had filed following entry of the Commission's prescription order. This supplement proposed an increase to $10.95 from the agreed-upon rate, which at that time was $7.62. Acting in response to a letter of protest filed by IPL, the ICC on October 30, 1981 rejected Supplement 4 on the ground that it

---

[1]The agency's prescription order was entered after reconsideration by the ICC. A more detailed description of this aspect of the parties' dispute is set forth in our prior opinion. *Iowa Power & Light Co. v. Burlington N., Inc.*, 647 F.2d at 801-02.

constituted a violation of the agency's previously issued prescription order. During this period, IPL initiated a breach of contract action against BN, seeking a declaratory judgment, injunctive relief and damages. *Iowa Power & Light Co. v. Burlington Northern Railroad Co.*, Civil No. 81-526-B (S.D. Iowa filed Oct. 27, 1981). That action remains pending.

After the Commission's adverse decision with respect to Supplement 4, BN filed a petition for review with the District of Columbia Circuit. That court vacated the agency's order, holding that "when a rate increase is tendered to the ICC after the effective date of the Staggers Act and the tendered rate is allegedly below the Section 202 market dominance threshold, the Commission may not reject the rate simply because it is above the level specified in an outstanding prescription order or pre-Act rate agreement." *Burlington Northern Railroad Co. v. ICC*, 679 F.2d 934, 942 (D.C. Cir. 1982). The case was remanded to the Commission, and BN thereafter submitted Supplement 8, which again proposed a rate of $10.95 for the coal transportation at issue. In addition, this supplement provided that the proposed rate was to be effective as of November 1, 1981, the date Supplement 4 would have taken effect absent the Commission's prior rejection.

In a decision dated December 9, 1982, the ICC approved Supplement 8 and authorized the retroactive application of the $10.95 rate. The Commission reasoned that because its legal error alone had prevented the railroad from collecting the higher rate since November 1, 1981, it was compelled to use its equitable powers "to make BN whole." The agency further ruled, however, that IPL would not be required to immediately repay the back amount due; rather, the parties were directed to apprise the Commission of the amount owed by the utility under Supplement 8 and suggest a reasonable payment schedule, which would thereafter be determined by the agency.[3] This order is now before us on IPL's petition for review.

---

[3] In a subsequent order dated June 7, 1983, the ICC determined the amount of principal and rate of interest to be paid by IPL, and

II

In contesting the Commission's decision, IPL initially challenges the agency's authority to allow retroactive application of the previously rejected rate. Specifically, the utility urges that the ICC's action contravenes both the Interstate Commerce Act and the "filed rate doctrine" and that the Commission does not possess the general equitable powers necessary to permit the action taken.

The framework for our review of the Commission's decision is supplied by the Administrative Procedure Act. Pursuant to that statute, agency action may be set aside if found to be, *inter alia*, "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). To the extent necessary, all relevant questions of law, including the interpretation of statutory provisions, are to be resolved by the reviewing court. 5 U.S.C. § 706. In addition, we observe that the interpretation "of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

A

The focus of IPL's primary contention concerning the Commission's authority to allow retroactive implementation of the previously rejected rate is 49 U.S.C. § 10761(a), which provides in pertinent part:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier

---

directed the utility to establish a payment schedule that, within a specified time-frame, would best fit its needs. The propriety of this order is not now before us.

> may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

The utility argues that the Commission's action in the present case contravenes both this provision and the "filed rate doctrine," and that it therefore must be rescinded. We cannot agree.

Although the initial sentence of section 10761(a) seemingly supports the contention advanced by IPL, we believe a reading of the provision as a whole demonstrates that it was not designed to prevent action such as that taken by the Commission in this case. The final sentence of the provision indicates that through this section Congress primarily intended to prevent carriers from discriminating among shippers, *see Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939) (predecessor of section 10761(a) "forbids [a] carrier from giving a voluntary rebate in any shape or form"); *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (prohibition against deviation from carrier's filed rate "embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination"), and it is clear that the Commission's action in the present circumstances does not conflict with that underlying purpose. IPL is admittedly the only shipper involved wth BN in the disputed transaction, and clearly there is no danger of rate discrimination as a result of the ICC's order. Applying section 10761(a) to bar the action taken by the Commission in this case would do nothing to advance the major purpose upon which that provision is premised – the prevention of rate discrimination among shippers by a carrier. *Cf. Johnson Machine Works, Inc. v. Chicago, Burlington & Quincy Railroad Co.*, 297 F.2d 793, 798 (8th Cir. 1962) (no opportunity for discrimination apparent in misrouting situation). In these circumstances, we cannot agree that the Commission's correction of its prior error through the

retroactive application of the previously rejected tariff conflicts with section 10761(a) and must therefore be overturned.

Moreover, the Commission's order does not conflict with the general mandate of the Revised Interstate Commerce Act. Nothing in the Act expressly prohibits the ICC from allowing the retroactive application of a tariff in the limited circumstances of this case; more significantly, the challenged action is consistent with the role contemplated for the ICC under the Act. Several statutory provisions authorize the Commission, in certain circumstances, to alter action it has previously taken. *See* 49 U.S.C. §§ 10324(b), 10327(g)(1). Further, under section 10707(d)(2), a carrier may receive reparations for underpayments which result from the agency's suspension of a rate later determined to be reasonable. The Commission's action in the present case, in terms of cause and effect, is comparable to an order requiring the payment of reparations under section 10707(d)(2). Essentially, both are designed to rectify inequities created by prior Commission action, and the means of correcting the prior error in each situation involves payment by shippers of the rate which should have been allowed under the tariff as originally requested. The above-mentioned statutory provisions, although not expressly authorizing the action taken by the ICC in this case, clearly indicate that it is not inconsistent with the Commission's specific authority under the Act.

For similar reasons, we are not persuaded that the "filed rate doctrine" bars the action taken by the ICC in this case. This doctrine, "which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory agency," *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 577 (1981), has as its source several Supreme Court decisions interpreting the Interstate Commerce Act and other regulatory statutes. *See, e.g., Lowden,* 306 U.S. at 520-21; *see also T.I.M.E. Inc. v. United States,* 359 U.S. 464 (1959); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951). Two considerations, "preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge

only those rates of which the agency has been made cognizant," serve as its primary predicates. *Arkansas Louisiana Gas*, 453 U.S. at 577-78 (*quoting City of Cleveland v. FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976)). The Commission's action in the present case is fully consistent with each of these underlying considerations.

Retroactive application of the previously rejected rate does not undermine the ICC's primary jurisdiction in the matter of rates; the Commission's action does not constitute abandonment of its supervisory role over the reasonableness of the rate charged by BN. Indeed, the agency has subsequently determined that the rate in question falls within its jurisdiction, *Retroactive Rate on Coal, Belle Ayr and Eagle Junction, Wyoming to Council Bluffs, Iowa*, Suspension Case No. 70992 (ICC Feb. 9, 1983), and although it declined to investigate the tariff at that stage, the Commission may still render a final determination concerning the rate's reasonableness upon the filing of a complaint by IPL. *See* 49 U.S.C. § 11701. Nor is there any indication that by permitting the previously rejected tariff to take effect retroactively, the ICC has in any way enabled BN to charge a rate unknown to the agency. Thus, it is apparent that the challenged action is entirely consistent with the considerations underlying the "filed rate doctrine." The mechanical application of the doctrine urged by IPL would not serve to promote those considerations in the present case, and we therefore cannot agree that the Commission's remedial measure must be disallowed. *Cf. Maine Public Service Co. v. FPC*, 579 F.2d 659, 666-67 (1st Cir. 1978) (where its underlying considerations were not implicated, "filed rate doctrine" did not require disallowance of surcharge by FPC).

We are convinced that the remedial action taken by the ICC is consistent with both the Interstate Commerce Act and the "filed rate doctrine." Consequently, we conclude that neither requires that the Commission's decision be overturned.

B

In a related argument, IPL suggests that the Commission lacks the equitable authority to correct its prior error in this

case. Essentially, the utility urges that the ICC cannot utilize equitable or inherent agency authority where, as is allegedly the situation here, the exercise of that authority conflicts with the agency's enabling legislation. We reject this contention.

The Supreme Court has recognized in analogous circumstances that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). At issue in *Callery Properties* was a Federal Power Commission order which required gas producers to refund to their customers the difference between amounts previously collected under judicially invalidated certificate orders and a price subsequently established by the Commission. The Court concluded that the agency had the authority to issue the refund order despite the fact that it had "no power to make reparation orders, . . . its power to fix rates . . . being prospective only . . . .", *Id.* The action taken by the ICC in the present case is comparable to that upheld in *Callery Properties* — the Commission has acted to undo what was wrongfully done by virtue of its prior order rejecting the increased rate requested by BN. Similar agency corrective action has been sanctioned in other contexts. *See, e.g., Tennessee Valley Municipal Gas Association v. FPC*, 470 F.2d 446 (D.C. Cir. 1972).

We cannot agree that the Commission was without authority to allow the erroneously rejected tariff to take effect retroactively as a means of correcting its prior error, we are not persuaded that the ICC has acted in a fashion "repugnant" to its enabling legislation, and, as indicated, the Commission's action is fatally inconsistent with neither the provisions of the Interstate Commerce Act nor the "filed rate doctrine."[3]

---

[3]In a recent letter counsel for IPL has cited as supporting IPL's position a decision of the Commission served June 28, 1983 in its Docket Ex Parte No. 394 (Sub-No. 1), *Cost Ratio for Recyclables — 1983 Determination*, in which the Commission states: "[S]hippers may receive refunds or reparations for overpayment *but carriers can never be made whole for underpayments.*" (Emphasis added.) That statement, however, was in different context and is not persuasive here.

In short, we are satisfied that the ICC does not lack the authority to correct its prior error in this case by allowing the rejected tariff to take effect retroactively, and that the exercise of its authority here is consistent with applicable legislative provisions.

III

IPL's assault upon the Commission's order also proceeds along a second front. Even assuming the ICC has the authority to allow the rejected tariff to take effect retroactively, the utility argues, its action here was arbitrary and capricious and must be set aside.

The Administrative Procedure Act authorizes a reviewing court to overturn agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In evaluating administrative action under this section

> the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted); *see generally* 5 B. Mezines, J. Stein & J. Gruff, *Administrative Law* Ch. 51 (1983).

Our review convinces us that the Commission's action was not arbitrary and capricious. The gravamen of IPL's contention in this regard is that the agency failed to weigh the equities in the utility's favor, and instead based its decision solely on the hardship incurred by BN. The record belies this assertion. By allowing IPL to repay the back amount due under Supplement 8 over a payment schedule to be subsequently determined, rather than in a lump sum, the Commission clearly acted in consideration of the utility's alleged repayment difficulties. In addition, the agency's decision does not preclude IPL from pursuing other avenues of relief. The utility is free to initiate an administrative challenge to the reasonableness of the $10.95 rate, *see* 49 U.S.C. § 11701, and its breach of contract action, through which the damages alleged-

ly incurred as a result of BN's implementation of a rate higher than that delineated in the parties' "letter of understanding" could conceivably be recouped, remains pending in federal district court. In these circumstances, we cannot say that the equitable balance struck by the Commission, and the remedial action taken to effectuate that balance, were arbitrary and capricious.[4]

IV

In sum, we conclude that the ICC acted within its authority in allowing the incorrectly rejected tariff to take effect retroactively, and that its action was not arbitrary and capricious. Accordingly, the petition for judicial review is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[4]In July of 1982, when BN initially submitted Supplement 8, the Commission's Tariff Section rejected the proposed tariff for failure to comply with the notice requirements of the Interstate Commerce Act and the ICC's tariff rules. BN appealed this decision to the full Commission, and the agency on December 9, 1982 issued its order allowing the tariff to be implemented retroactively. In addition to challenging the validity of this order, IPL also contends the Commission acted arbitrarily insofar as it permitted the tariff to cover the period between July and December, 1982. The inapplicability of the higher rate in this interim, the utility argues, is the result of BN's failure to simply refile Supplement 8 with the requisite notice in July. Consequently, the Commission, which ultimately upheld the determination that Supplement 8 had been filed without proper notice, should have declined to include this period within the time-frame covered by the tariff. We find this argument to be without merit. BN acted within its rights in appealing to the full Commission and securing a determination as to the propriety of the tariff's proposed retroactivity; it cannot be held responsible for the length of time involved in the agency's decision-making process. Given these circumstasnces, we cannot say the Commission acted arbitrarily in allowing the tariff to be effective over the July 1982 - December 1982 period.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

[Service Date Dec 23 1982] Decision

Docket No. 38885

BURLINGTON NORTHERN RAILROAD COMPANY – PETITION FOR RECONSIDERATION OF REJECTION

Decided: December 9, 1982

We have before us a petition for administrative review filed by the Burlington Northern Railroad Company(BN). It involves Supplement 8 to Tariff ICC BN 4187-A. Supplement 8 would establish a base rate of $10.95 per ton for the transportation of coal to the Council Bluffs, Iowa generating plant of Iowa Power and Light Co. (IPL). It further provides for the $10.95 rate to be the effective rate since November 1, 1981. Supplement 8 was filed with the Commission on July 14, 1982 with a proposed effective date of July 15, 1982.

Supplement 8 was rejected on July 16, 1982, because of the failure to provide statutory notice, as required by 49 U.S.C. 10762(c)(3) and 49 C.F.R. 1300.14(a)(ii), and to include a title page notation showing authority for publication on short notice, as required by 49 C.F.R. 1300.3(h). The retroactive effectiveness of the proposed rate was not discussed. However, the parties were advised that, if the rejection were appealed, they should address the propriety of retroactively reinstating the $10.95 rate. The BN did so in its July 26, 1982 petition for review; IPL, the only shipper, did so in its reply filed August 16, 1982. Having considered their arguments, we will allow the railroad to refile Supplement 8 on 20 days' notice.

Background

In 1978, BN began transporting coal to the Council Bluffs, Iowa generating plant of IPL. That year, BN sought to increase its rate above the level agreed to by the railroad and IPL in a 1976 "letter of understanding." After an investigation, we found the increased rate unreasonably high and prescribed the agreed rate as the maximum reasonable rate. *Unit-Train Rates on Coal-*

Burlington Northern, Inc., 364 I.C.C. 186 (1980), *affirmed, Iowa Power and Light Co.* v. *Burlington Northern Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1253 (1982).

On October 30, 1981, at IPL's request, we rejected Supplement 4, which would have increased the prescribed rate to $10.95. The railroad appealed this decision. In *Burlington Northern Railroad Company* v. *ICC*, 679 F.2d 934 (D.C. Cir. 1982), the reviewing court held that a tariff allegedly below the market dominance threshold set forth in 49 U.S.C. 10709 may not be rejected simply because the rate exceeds the level prescribed in an outstanding order or a pre-Staggers Act agreement.[1] If the $10.95 rate is below the jurisdictional threshold, the court concluded, the Commission must accept the supplement. The Commission order was vacated and the court remanded it to us for further action consistent with its opinion. *Id.* at 942. Thereafter, BN filed Supplement 8.

The Parties' Positions

The railroad contends that the sole basis for IPL's objection to Supplement 4, and our rejection of it, was that the proposed rate conflicted with a prescription order based on a pre-Staggers Act agreement. But for our legal error, that supplement would have become effective on November 1, 1981 and the BN would have been entitled to collect the higher rates published therein. BN argues that equitable considerations necessitate that we undo the effect of our error by placing the parties in the positions they would have occupied had the tariff not been wrongfully rejected. The railroad also avers that since statutory notice was provided when it attempted to file Supplement 4, no further notice is necessary because Supplement 8 effectively reissues Supplement 4.

IPL asserts that retroactive tariffs are barred by 49 U.S.C. 10761(a), which requires that a carrier provide its service "only

[1]The pertinent provisions of 49 U.S.C. 10709 were added by the Staggers Rail Act of 1980, P.L. 96-448.

if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter." Since tariffs may not be given retroactive effect, the Commission cannot reinstate a tariff not in effect at the time the traffic moved. IPL argues that exercise of our equitable powers does not allow us to contravene the Interstate Commerce Act. Moreover, IPL asserts that Supplement 8 contains new matter,[2] so the statutory notice period must again be satisfied.

Discussion

We are persuaded that we must use our equitable powers to make BN whole. It is true that our error alone prevented BN from recovering since November 1, 1981, the $10.95 rate specified in Supplement 8. We will authorize the BN to reinstate Supplement 8 with an effective date of November 1, 1981.

We will also require, however, that the railroad refile the tariff on 20 days' statutory notice.

This action alleviates the unjust consequences of our previous unlawful tariff rejection. The Supreme Court has acknowledged that an agency has the power to correct inequities occasioned by its own errors. In *United Gas Improvement Co.* v. *Callery Properties Inc.*, 382 U.S. 223 (1965), the Court reviewed a Federal Power Commission (FPC) order which required natural gas producers to refund monies charged pursuant to FPC orders later vacated in a judicial proceeding. While recognizing that the FPC (unlike the ICC) did not have the statutory authority to grant a refund, the Court upheld the agency's right to order refunds where excessive rate payments had occurred due to its vacated orders. The Court stated (*Id.* at 229):

> [The Commission] is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here, the original certificate orders

[2] A number "4" enclosed in a square with an accompanying explanatory note placed next to the rate item [200-D] stating that the increased rate is to be effective "beginning with November 1, 1981."

> were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order . . . An agency, like a court, can undo what is wrongfully done by virtue of its order.

In *Tennessee Valley Municipal Gas Association* v. *FPC*, 470 F.2d 446 (D.C. Cir. 1972), the court directed the FPC to put an aggrieved party in the same position that it would have occupied had that agency not erred in improperly dismissing a complaint concerning natural gas rates. The court determined that the FPC must compensate for its erroneous dismissal so that the "policy of the Natural Gas Act is not arbitrarily to be defeated by uncorrected Commission error . . . ." *Id.* at 452. The corrective measures entailed retroactive rate relief. Despite the FPC's statutory authority to establish rates prospectively only, the court held that:

> The measure of the retroactivity which the Commission must grant to cure its legal error is the time elapsed between its wrongful dismissal of the Section 5 case and the time it cured that error by vacating the dismissal and reopening the hearings.

(*Id.*).

The court reasoned that the statutory language governing the FPC's power to determine rates was intended "to protect established expectations under legally established rate schedules. It forbids belated determinations that rates charged in the past were excessive." (*Id.*) While gas buyers had no protection from excessive charges collected during the pendency of a rate hearing, the court discerned no justification for extending that principle to say that the purchasers are unprotected from legal error by the FPC which "wrongfully and unfairly" prolongs that pendency. The court held that the agency could order that "its prospective order should have occurred 112 days earlier." (*Id.* at 453.) Moreover, the court held that the party liable for the refunds could not claim "justifiable reliance or protectable expectations based on FPC action which was illegal . . . [s]ince the legal error causing the delay was sought by and benefitted [that party] . . . ." (*Id.*).

In *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301 (1935), the Supreme Court protected the carrier from unfairness by refusing "to make the carrier pay the price" of ICC errors. The Florida Railroad Commission had prescribed maximum rates for long movements within Florida. We found those rates to be unlawfully low and prescribed higher rates which the railroads then charged. Before our order became effective, the Florida Commission issued a new order, providing that its prior order would be suspended "so long as [the] federal Commission's order should remain in force." 295 U.S. at 323 (Roberts, J., dissenting). Our order later was reversed by the Supreme Court for insufficient factual findings. *Florida* v. *United States*, 282 U.S. 194 (1931). Subsequently, on new evidence and findings conforming to the Supreme Court's earlier opinion, we issued an order setting the maximum rates at the same level as before.

The issue addressed by the Court in *Atlantic Coast Line* was whether the shippers were entitled to restitution for charges collected by the carriers under color of the original Commission rate order that had been reversed for inadequate findings — that is, the difference between the ICC's rate order and the Florida Railroad Commission's rate order. After carefully weighing the equities, the Court held that the shippers were not entitled to restitution because "[w]hat was injustice at the date of the second order of the Commission [i.e., the unreasonably low rates prescribed by the Florida Railroad Commission] is shown beyond a doubt to have been injustice also at the first." 295 U.S. at 316. Noting that "[a] complex of colorable right and procedural mistake has brought about a situation in which the equities of the carrier, if they are not protected by the court, will be unprotected altogether" *Ibid.*, the Court refused "to make the carrier pay the price of the blunders of the commerce board in drawing up its findings'" *Id.* at 314.[3]

---

[3] *See also National Insulation Transp. Com.* v. *Aberdeen and Rockfish R. Company*, 365 I.C.C. 624, 628 (1982), where, in another context, we stated that "equitable principles demand that we provide the opportunity for relief to those with valid grievances before us. We

Exercise of our equitable powers here to protect the interests of BN is therefore both proper and appropriate. As a result of Commission error, the $10.95 rate was wrongfully denied implementation on November 1, 1981. BN will be unable to recoup the revenues lost unless the tariff instrument in which it originally sought to publish a prospective $10.95 rate is given retroactive effect. The policy of the Interstate Commerce Act should not be arbitrarily undermined by uncorrected Commission error.[4] Moreover, it is now apparent that Congress does not want carriers penalized whose lawful rates are delayed implementation due to the exercise of our administrative function. Previously, when we suspended a rate increase any revenues that the carrier would have earned were never collected. *Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade,* 412 U.S. 800, 823

---

will not permit strict interpretations of our rules . . . to prevent us from adhering to principles of fairness."

[4]See 49 U.S.C. §10704(a)(2) which directs that:

> The Commission . . . maintain . . . standards and procedures for establishing revenue levels for rail carriers . . . that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business. The Commission shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph . . . . Revenue levels established under this paragraph should—
>
> (A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and
>
> (B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

The tariff rejection here, if uncorrected, would undermine this statutory admonition by denying BN revenues it would have collected under the effective tariff.

(1973) (Opinion of Marshall, J.). However, under 49 U.S.C. 10707(d)(2), enacted in the Staggers Act, if a suspended increase is ultimately upheld as lawful, the carrier is entitled to obtain the additional revenues from shippers using its service during the suspension period.

Here we have a tariff rejection due to mistaken Commission interference, rather than a suspension. The consequence, however, is the same: the carrier is not allowed to collect its increased rate for a period of time. Reinstatement of Supplement 8 will enable BN to collect the difference between the rate at the Supplement 7 level and the Supplement 8 level for the time period we mistakenly disallowed its effectiveness.[3]

Our action here is not inconsistent with the general rule that tariffs may not be given retroactive effect. Generally, rates applicable to transportation are those in effect when shipments originate. *See e.g., S.A. Gerrard Co.* v. *Belt Ry. Company of Chicago,* 270 I.C.C. 59, 62 (1948); *Central Lumber Company* v. *Chicago, Milwaukee & St. Paul Railway Company,* 18 I.C.C. 495, 497 (1910). Here the carrier has not attempted, belatedly, to file a tariff which assesses charges retroactively for shipments moving in a previous time period. Rather, the carrier timely published its tariff in accordance with the statutory notice provision of the Interstate Commerce Act and was denied implementation of its *prospective* rate solely due to our error.

In addition, our action does not conflict with the "filed rate doctrine." This doctrine "forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co.* v. *Hall,* 453 U.S. 571, 577 (1982). In the circumstances

---

[3]Although not requested by BN, an alternative that was available to it to recover its shortfall in this instance was a surcharge. *See* Docket No. 37423, *Temporary Fuel Shortfall Recovery Surcharge,* 364 I.C.C. 336 (1980).

present here, BN properly filed its tariff with the Commission; it was only our error that barred its effectiveness.[6]

We emphasize the narrowness of our holding. The carrier here acted in accordance with the law in attempting to file its tariff supplement. Due to our mistaken interpretation of the Staggers Act, we rejected it. In *Burlington Northern Railroad Company* v. *ICC, supra,* the court ruled that BN's tariff could not be rejected "simply because it [was] above the level specified in an outstanding prescription order or a pre-Act agreement." Our equitable powers have been invoked solely to rectify the wrong we have perpetrated on BN due to our mistaken rejection of its tariff supplement.

We shall require, however, that BN refile Supplement 8 on 20 days' notice. Although IPL did not exercise its right to protest the reasonableness of the rate published in Supplement 4 in October 1981, it did request rejection on other grounds. Due to the unusual posture of this case, we will not penalize IPL for failing to put forward all arguments which would have protected its interests then. In addition, we agree with IPL that Supplement 8 contains new matter. A 20-day notice period will protect the rights of IPL, but will not harm the right of BN to recover lost revenues caused by the tariff rejection decision.

---

[6]In *Arkansas Louisiana Gas Co.* v. *Hall, supra* at 577, the Supreme Court identified two bases for the filed rate doctrine: (1) to preserve the agency's primary jurisdiction over rate reasonableness and (2) to insure that regulated entities charge customers only rates of which the agency has been made aware. To the extent our decision here departs from the doctrine, it is nonetheless compatible with it. Since the rate involved may be less than the jurisdictional threshold of Section 10709, there would be no Commission primary jurisdiction to preserve. See *Burlington Northern Railroad Company* v. *ICC, supra* at 936. On the other hand, if it exceeds the threshold, our power to investigate and suspend remains. Moreover, the Commission has been cognizant of BN's tariff filings since this controversy arose. Not only have tariffs been submitted, but the issue has been litigated extensively in federal court.

Because we are acting under our equitable powers here, we will not require IPL to pay the entire back amount immediately. Rather, the parties should apprise us of the monies owed by IPL under the reinstated Supplement 8 and suggest a reasonable payment schedule. We shall then determine the payment schedule.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

IT IS ORDERED:

The petition for administrative review is granted. The BN may refile Supplement 8 to Tariff ICC BN 4187-A on 20 days' notice. Upon the effective date of Supplement 8 the BN shall apprise the Commission of the amount of the undercharge created by this action and the parties shall submit to the Commission suggested payment schedules within 30 days thereof.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Chairman Taylor concurred with a separate expression. Commissioner Simmons concurred with a separate expression. Commissioner Sterrett concurred in part and dissented in part with a separate expression. Commissioner Andre would allow the tariff to become effective on one day's notice.

KATHLEEN M. KING
(SEAL) ACTING SECRETARY

CHAIRMAN TAYLOR, concurring:

In my opinion, our decision contains some unfortunate language which makes it erroneously appear the Commission has so prejudged the issues that we are going to permit the new tariff to take effect regardless of protest. To dispell any false impression, I believe the misleading language should have been removed.

However, despite any unintended implication of prejudgment which may arise from the tenor of what we've said, the fact of the matter is that our decision properly rectifies the Court-determined error by placing the parties in the same positions they would have been in had we not rejected the first tariff. As a result, our determination to accept for filing Supplement 8, on 20 days' notice, will protect the right of IPL and the power of the Commission to investigate and suspend, should it elect to do so, if the rates exceed the jurisdictional threshold.

COMMISSIONER SIMMONS, concurring:

My decision to put the parties in the positions they would have been in had we not rejected the tariff should not be construed as condoning BN's repeated efforts to avoid its obligation under the letters of agreement. It is based strictly on the view that the Commission should correct its own legal errors. I note that IPL is not precluded from seeking to enforce the letters of agremeent in a judicial forum.

COMMISSIONER STERRETT, concurring in part and dissenting in part:

I agree with the majority's decision to allow the filing of Supplement 8. However, in the circumstances presented here I would permit the tariff to become effective on one day's notice. The majority's decision does not truly make BN whole, as it offers IPL another opportunity beyond that provided by statute to challenge the rate. One day's notice, on the other hand, would put BN in the exact position it would have been in had the Commission not rejected Supplement 4, and would not affect IPL's remedies through court action or complaint filed here.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2550 September Term, 1982

Iowa Power and Light Company,
Petitioner,

vs.

United States of America, et al.,
Respondents,

Burlington Northern Railroad Co.,
Intervenor.

[FILED
Aug 3 1983
Robert D. St. Vrain
Clerk]

Petition for Review of an Order of the Interstate Commerce Commission.

This cause came on to be heard on petition for review of an order of the Interstate Commerce Commission, appendix and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the petition for review be, and it is hereby, denied.

August 3, 1983

Total costs of respondent for briefs for recovery from petitioner: $77.40

Total costs of intervenor-respondent for briefs for recovery from petitioner: $106.80

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit
8/31/83

APPENDIX D

STATUTES

INTERSTATE COMMERCE ACT, TITLE 49 UNITED STATES CODE:

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (1) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.

§ 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle.

A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly—

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Com-

mission under subchapter III or IV of that chapter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(2) A joint tariff filed by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter shall identify the carriers that are parties to it. The carriers that are parties to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff. The Commission may prescribe or approve what constitutes a concurrence or acceptance.

(c)(1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

(2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate or the value of service under the rate, the carrier shall publish, file, and keep open for public inspection a notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. In the case of a carrier other than a rail carrier and motor common carrier of passengers with respect to special or charter transportation, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under

subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title shall become effective in accordance with the provisions of such section. In the case of a motor common carrier of passengers, a proposed rate change resulting in an increased rate or a new rate applicable to special or charter transportation shall not become effective for 30 days after the notice is published, and a proposed rate change resulting in a reduced rate applicable to special or charter transportation shall not become effective for 10 days after the notice is published.

(d)(1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

(2) The Commission may prescribe regulations for the simplification of tariffs by carriers providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title and permit them to change rates, classifications, rules, and practices without filing complete tariffs that cover matter that is not being changed when the Commission finds that action to be consistent with the public interest. Those carriers may publish new tariffs that incorporate changes or plainly indicate the proposed changes in the tariffs then in effect and kept open for public inspection. However, the Commission shall require that all rates of rail carriers and rail rate-making associations be incorporated in their individual tariffs by the end of the 2d year after initial publication of the rate, or by the end of the 2d year after a change in a rate becomes effective, whichever is later. The Commission may extend those periods if cause exists, but if it does, it must send a notice of the extension and a statement of the reasons for the extension to Congress. A rate not incor-

porated in an individual tariff as required by the Commission is void.

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

(f) The Commission may grant relief from this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(g) The Commission shall streamline and simplify, to the maximum extent practicable, the filing requirements applicable under this section to motor common carriers of property with respect to transportation provided under certificates to which the provisions of section 10922(b)(4)(E) of this title apply and to motor contract carriers of property with respect to transportation provided under permits to which the provisions of section 10923(b)(5) of this title apply.

No. 83-1080

In the Supreme Court of the United States

OCTOBER TERM, 1983

IOWA POWER & LIGHT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN BROADLEY
General Counsel

ELLEN D. HANSON
Associate General Counsel

CECELIA E. HIGGINS
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether the court of appeals correctly held that the Interstate Commerce Commission properly exercised equitable authority to allow a rail freight tariff to take effect retroactively because the railroad had been prevented from collecting a rate increase solely because of a legal error committed by the Commission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1080

IOWA POWER & LIGHT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 712 F.2d 1292. The decision of the Interstate Commerce Commission (Pet. App. 11a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on August 3, 1983. Justice Blackmun extended the time for filing a petition for a writ of certiorari to December 31, 1983, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, petitioner and the Burlington Northern Railroad Company entered into an agreement on the rate ($7.62 per ton) the railroad would charge for hauling coal from a mine in Wyoming to petitioner's electric generating plant under construction in Council Bluffs, Iowa (Pet. App. 2a). In 1978, when the coal movement began, the railroad filed a tariff with the Interstate Commerce Commission, which contained a substantially higher rate ($10.95 per ton) for moving coal on that line. Petitioner then complained to the Commission that the rate that the railroad established by tariff was unreasonably high because it exceeded the contract rate. After conducting a hearing, the Commission found that the agreed rate was the maximum reasonable rate, and prescribed that rate for future movements.[1] The railroad thereafter amended its tariff to reflect the agreed rate (*ibid.*).

After the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, took effect, the railroad submitted to the ICC a new tariff, in which the railroad proposed, effective November 1, 1981, to increase the rate for the traffic of coal between Wyoming and Iowa. The railroad maintained that its proposed higher rate was below the level at which the ICC acquires jurisdiction under the Staggers Act to determine whether a rail rate is reasonable. See Section 202 of the Staggers Act, 49 U.S.C. (Supp. V) 10709(d).[2]

---

[1]On appeal, the Court of Appeals for the Eighth Circuit affirmed the Commission's order. *Iowa Power & Light Co.* v. *Burlington Northern R.R., Inc.*, 647 F.2d 796 (8th Cir.), cert. denied, 455 U.S. 907 (1982).

[2]Under Section 202(d) of the Staggers Act, 49 U.S.C. (Supp. V) 10709(d), a rail carrier's rates are not subject to ICC review unless the carrier has market dominance. But the Commission cannot find market dominance if the rate the carrier charges is below a specified revenue-to-variable cost percentage—165% for the period involved in this case. 49 U.S.C. (Supp. V) 10709(d). The railroad contended that the proposed ratio did not exceed that percentage.

Petitioner asked the Commission to reject the tariff before it took effect, pursuant to 49 U.S.C. (Supp. V) 10762(e).[3]

The Commission rejected the proposed tariff because it violated the ICC's 1980 rate prescription order (Pet. App. 3a-4a). The Commission held that, even though the proposed tariff rate was allegedly below the level at which the ICC had jurisdiction to determine the reasonableness of a rail carrier's rates, the prescription order was still binding and required the tariff to be rejected. Because of the Commission's action, the proposed higher tariff rate never took effect (Pet. App. 2a-3a).

The United States Court of Appeals for the District of Columbia Circuit reversed the Commission's decision to reject the railroad's tariff. *Burlington N.R.R.* v. *ICC*, 679 F.2d 934 (D.C. Cir. 1982). The court held that "when a rate increase is tendered to the ICC after the effective date of the Staggers Act and the tendered rate is allegedly below the Section 202 [jurisdictional] threshold, the Commission may not reject the rate simply because it is above the level

---

[3]Petitioner also filed a contract action for damages for the railroad's breach of the 1976 rate agreement. *Iowa Power & Light Co.* v. *Burlington Northern R.R.*, Civ. No. 81-526-B (S.D. Iowa, Nov. 22, 1983), slip op. 1 (a copy of the district court's opinion has been lodged with the Clerk of the Court). On November 22, 1983, the district court ruled in petitioner's favor, holding that the contract for the rates governing the coal movements was valid (slip op. 19, 24-25). The district court enjoined the railroad from continuing to breach the contract by doing or failing to do any act that would cause the tariff rate to be different from that specified in the contract (*id.* at 25). The district court also ordered the railroad to refund "all monies received by it from Iowa Power under tariffs for unit train coal transportation from Belle Ayr, Wyoming, to Council Bluffs Unit No. 3 in excess of the rates specified in the contract" (*ibid.*). Notwithstanding the district court's order, the railroad apparently is of the view that the district court's decision requires it to repay petitioner only $5,165,705.38 of the $9,067,065.26, petitioner paid in July 1983 (Pet. 4). The railroad has filed a notice of appeal from the district court's judgment.

specified in an outstanding prescription order or a pre-[Staggers] act Rate Agreement" (679 F.2d at 942).

2. After the court of appeals' remand to the Commission, the railroad submitted a new tariff that would have established the previously filed rate and would have applied it retroactively to November 1, 1981—the date the erroneously rejected tariff would have taken effect. At petitioner's request, a Commission employee board rejected the new tariff for failure to provide the statutorily required 20 days' notice for filing a rate increase, 49 U.S.C. (Supp. V) 10762(c)(3) (Pet. App. 11a).

The railroad appealed to the full Commission, which granted review (Pet. App. 11a-19a). The Commission held that it would be a proper exercise of its equitable powers to make the railroad whole to permit the tariff to take effect retroactively. The Commission pointed out that it was its error alone that had prevented the railroad from collecting the higher tariff rate beginning November 1, 1981 (*id.* at 3a,16a). The ICC allowed the railroad to resubmit the tariff, but required it to provide 20 days' notice in order to afford petitioner the opportunity to seek a Commission order suspending and investigating the proposed rate under 49 U.S.C. (Supp. V) 10707 (Pet. App. 13a). The Commission also stated that it would establish a fair schedule for petitioner's payment of the sum it owed the railroad for the retroactive period (*id.* at 19a).

The court of appeals affirmed (Pet. App. 1a-10a).[4] The court determined that the Commission's action "did not

---

[4]While the review proceeding was pending, the railroad resubmitted its tariff and petitioner protested it. The Commission declined to suspend or investigate it, and on February 10, 1983, the tariff took effect nunc pro tunc to November 1, 1981. The Commission also determined a payment schedule and interest rate for the sum petitioner owed the railroad. On July 12, 1983, petitioner paid the railroad $9,067,065.26, which was the full amount it owed for the retroactive period (Pet. 4).

impermissibly conflict with the Interstate Commerce Act, and was not arbitrary or capricious" (*id.* at 1a).

The court rejected petitioner's argument that the Commission's order contravened 49 U.S.C. (Supp. V) 10761(a), which limits the rate a carrier may charge a shipper to the rate in effect under a tariff. The court reasoned that the purpose of the provision was to protect shippers against discriminatory rates and that there was no possibility of discrimination in this case since petitioner was the only shipper served under this rate (Pet. App. 4a-6a). The court also rejected petitioner's claim that the Commission's order violated the related "filed rate doctrine," which prohibits the carrier from charging a rate not on file with the Commission. The court reasoned that the retroactive rate did not undermine the two policies that underlie that doctrine—preservation of the ICC's primary jurisdiction and the need to insure that the ICC is aware of the rates charged by the regulated entities (Pet. App. 6a-7a). The court noted that the Commission was fully aware of the railroad's proposed rate at all times. Finally, the court held that the Commission's order was a reasonable exercise of its inherent authority to "undo what is wrongfully done by virtue of its order" (Pet. App. 8a, quoting *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965)).

ARGUMENT

The decision of the court of appeals — that the Commission properly exercised its narrow equitable authority to undo its own legal errors — is a reasonable interpretation of the statutory scheme governing the Commission's delegated power. Moreover, the decision conflicts with no decision of this Court or any other court of appeals. Finally, we note that it is at least arguable that the resolution of the issue will be irrelevant to petitioner in this case, who, in light of the disposition of its contract action against the railroad, may

very well recover from the railroad the full amount paid pursuant to the Commission's order under attack here. Accordingly, further review of the decision below by this Court is unwarranted.

1. Petitioner argues (Pet. 5-8) that the court of appeals erred in not holding that 49 U.S.C. (Supp. V) 10761(a) prohibits the Commission from modifying an effective rate retroactively on behalf of a carrier. It claims that 49 U.S.C. (Supp. V) 10761(a) and its predecessor have been interpreted consistently by both the Commission and this Court as a flat ban on the kind of relief the Commission provided in this case.

Petitioner's contention ignores, however, the reasoning of the court of appeals that the flat prohibition in 49 U.S.C. (Supp. V) 10761(a) was intended only "to prevent carriers from discriminating among shippers" (Pet. App. 5a). See *Lowden* v. *Simonds-Shields-Lansdale Grain Co.*, 306 U.S. 516, 520-521 (1939) and *Louisville & N.R.R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915). Petitioner makes no effort to challenge that holding. Nor does petitioner dispute the court's conclusion that petitioner is "the only shipper involved with [the railroad] in the disputed transaction, and clearly there is no danger of rate discrimination as a result of the ICC's order" (Pet. App. 5a).

2. Petitioner argues (Pet. 8-10) alternatively that the decision below violates the filed rate doctrine, which is designed to protect the shipper from unexpected retroactive charges in rates for shipments it already authorized. See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981).

Again petitioner completely ignores whether the reason for the prohibition against imposing unfiled rates has any application to this case. See *Maine Public Service Co.* v. *FPC*, 579 F.2d 659, 666-667 (1st Cir. 1978).

The court of appeals correctly held that "[t]he Commission's action in the present case is fully consistent with each of the[ ] underlying considerations" for the filed rate doctrine. First, the "[r]etroactive application of the previously rejected rate does not undermine the ICC's primary jurisdiction in the matter of rates" because the Commission did not abandon "its supervisory role over the reasonableness" of the railroad's rate (Pet. App. 6a-7a). 453 U.S. at 577. Indeed, the Commission required the railroad to resubmit its tariff and give an additional 20 days' notice so that petitioner could protest the rate as too high. Therefore, the Commission preserved its jurisdiction over the rates. Second, the Commission was fully aware of the rate that the railroad charged and therefore the Commission's action did not undermine the filed rate doctrine's mandate "that regulated companies charge only those rates of which the agency has been made cognizant." *Arkansas Louisiana Gas Co.*, 453 U.S. at 577-578 (quoting *City of Cleveland* v. *FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976)). Finally, the court of appeals properly held that the filed rate doctrine did not bar the Commission from applying a rate retroactively in the unique circumstances presented here, where the rate was rejected because of the ICC's erroneous jurisdictional determination as opposed to an erroneous determination of the reasonableness of the proposed rate. Compare *Arkansas Louisiana Gas Co.*, 453 U.S. at 578.

3. Petitioner contends (Pet. 10-11) that the court of appeals erred in holding that the Commission has inherent equitable authority to modify rates retroactively. Contrary to petitioner's suggestion (Pet. 10), the fact that Congress

did not explicitly authorize the Commission to allow a tariff to take effect from the date the rate should have become effective, does not mean that the Commission lacks such power. As this Court held in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. at 229, "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." This is particularly true where, as here, Congress provided broad authority to the Commission to change its final decisions to correct any material errors. See 49 U.S.C. (Supp. V) 10322(g)(1) (motor carriers), 10327(g)(1) (rail carriers), and 10324(b) (general provision); Pet. App. 6a. It was not necessary for Congress to list in the agency's organic statute all of the situations in which this authority could be exercised by the Commission.[6]

In addition, pursuant to 49 U.S.C. (Supp. V) 10707(d)(2), the Commission has authority to order a shipper to pay reparations to a carrier for underpayments that result from the Commission's suspension of a rate later found to be reasonable. As the court of appeals noted (Pet. App. 6a):

> The Commission's action in the present case, in terms of cause and effect, is comparable to an order requiring the payment of reparations under section 10707(d)(2). Essentially, both are designed to rectify inequities created by prior Commission action, and the means of correcting the error in each situation involves

---

[6]Petitioner contends (Pet. 11) that the Court's decision in *United Gas Improvement Co.* v. *Callery Properties, supra,* was based on the FPC's statutory authority to attach conditions on the certificates it issued. But the refund order was not based on either of the two conditions the FPC had imposed in that case; the order refunded money collected pursuant to a previously overturned unconditional certificate. 382 U.S. at 225-226. In addition, nothing in the Court's discussion of the refund order (*id.* at 229-230) suggests that it was justified by any specific statutory authority; instead, the decision is clearly based on the inherent authority of any agency, like that of any court, to do equity in particular circumstances.

payment by shippers of the rate which should have been allowed under the tariff as originally requested.

Based on these similarities, the court reasonably concluded that the Commission's order is not inconsistent with the "specific authority [to modify rates] under the Act" (Pet. App. 6a).

4. Finally, petitioner contends (Pet. 11-12) that this case is "similar" to *ICC* v. *American Trucking Ass'ns, Inc.*, No. 82-1643 (June 20, 1983), which is presently pending before this Court. The issue in that case is whether the Commission has authority to reject an effective tariff and thereby render it void if the Commission finds that the tariff filing constituted a significant violation of a rate bureau agreement.[7] The disposition of that case will depend on the scope of the Commission's rejection power under 49 U.S.C. (Supp. V) 10762(e) and the Commission's ancillary power to enforce rate bureau agreements. See 49 U.S.C. (Supp. V) 10706 and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). Thus, the decision in *American Trucking Ass'ns, supra,* will not cast doubt on the ICC's equitable authority to undo the adverse consequences of mistakes it commits. Accordingly, there is no need for the Court to hold this petition pending the final disposition of *ICC* v. *American Trucking Ass'ns, supra.*

---

[7]Also pending before the Court on petitions for a writ of certiorari is *Aberdeen & R.R.R. v. ICC*, Nos. 82-707 and 82-804. At issue in that case is whether the Commission has authority to reject a tariff after it has become effective because of missymbolizations in the tariff.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN BROADLEY
General Counsel

ELLEN D. HANSON
Associate General Counsel

CECELIA E. HIGGINS
Attorney
Interstate Commerce Commission

APRIL 1984

DOJ-1984-04

No. 83-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IOWA POWER & LIGHT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
DONALD E. ENGLE
Senior Vice President
—Law & Government Affairs

NICHOLAS P. MOROS
General Counsel
—Administrative Law

BURLINGTON NORTHERN
RAILROAD COMPANY
176 East Fifth Street
St. Paul, Minnesota 55101

BETTY JO CHRISTIAN *
EDWARD R. LEAHY
CHARLES G. COLE
STEPTOE & JOHNSON
Chartered
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-2000

**Counsel of Record for Respondent Burlington Northern Railroad Company*

Dated: April 4, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Interstate Commerce Commission can correct its own legal error by permitting a wrongfully rejected tariff to take effect as of its original effective date.

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES OF BURLINGTON NORTHERN, INC.:

BN FINANCIAL SERVICES INC.

BURLINGTON NORTHERN AIRMOTIVE INC.

BURLINGTON NORTHERN INTERNATIONAL SERVICES INC.

BURLINGTON NORTHERN RAILWAY COMPANY

- The Belt Railway Company of Chicago
- Camas Prairie Railroad Company
- Chicago Union Station Company
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- Galveston Terminal Railway Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company
- Keokuk Union Depot Company
- The Lake Superior Terminal and Transfer Railway Company
- Longview Switching Company
- The Minnesota Transfer Railway Company
- Paducah & Illinois Railroad Company
- Portland Terminal Railroad Company
- The Pueblo Union Depot and Railroad Company
- The Saint Paul Union Depot Company
- Terminal Railroad Association of St. Louis

Trailer Train Company

The Wichita Union Terminal Railway Company

Winona Bridge Railway Company

COLT INTERMODAL INC.

THE EL PASO COMPANY

GLACIER PARK COMPANY

GLACIER PARK LIQUIDATING COMPANY

MERIDIAN LAND & MINERAL COMPANY

MILESTONE PETROLEUM INC.

Butte Pipe Line Company

Portal Pipe Line Company

NEW MEXICO AND ARIZONA LAND COMPANY

PLUM CREEK TIMBER COMPANY, INC.

R-M HOLDINGS CORPORATION

The El Paso Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1080

IOWA POWER & LIGHT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Burlington Northern Railroad Company[1] respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

---

[1] Burlington Northern Railroad Company, a party to the proceeding before the ICC, was granted intervention of right by the Eighth Circuit, and hence is a proper respondent in this case.

COUNTER-STATEMENT

The decision below upholds an order of the Interstate Commerce Commission ("ICC") that corrects a prior legal error by permitting a wrongfully rejected tariff to take effect as of its original effective date. The Statement provided by petitioner Iowa Power and Light recites the chronology of events preceding the decision at issue here, but fails entirely to make clear the context of Congressional deregulation in which these events occurred, the nature of the ICC's original error, or the rationale for the ICC's correction of that error.

A. ICC Jurisdiction Under the Staggers Act

Until 1976, the ICC had jurisdiction over all transportation rates charged by railroads under the "just and reasonable" standard of the Interstate Commerce Act. 49 U.S.C. §§ 1(5), 15(1) (1970). During the 1970's, however, Congress began to consider the impact of regulation on the railroads' need to achieve adequate revenues to assure their continued existence.

In the 4-R Act of 1976,[2] Congress sought to reduce the regulatory burdens on railroads by limiting the ICC's jurisdiction to situations in which particular railroads had "market dominance" over the traffic involved. 49 U.S.C. § 1(5)(b) (1976). Determinations of market dominance, however, were still vested in the discretion of the ICC. The ICC adopted a relatively broad interpretation of market dominance that assured continued ICC jurisdiction in most cases.[3]

Thereafter, in the Staggers Rail Act of 1980,[4] Congress, for the first time in almost 100 years, specifically curtailed

---

[2] Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976).

[3] Burlington Northern Railroad v. ICC, 679 F.2d 934, 936 (D.C. Cir. 1982).

[4] Pub. L. No. 96-448, 94 Stat. 1895. The Staggers Act was explicitly predicated on findings that railroad revenues were insuffi-

the rate reasonableness jurisdiction of the ICC by legislating a numerical "jurisdictional threshold." The jurisdictional threshold is set forth in the statute as a ratio of a rail carrier's revenues to its variable costs for a particular movement. A rate which yields a ratio below that threshold is conclusively presumed to be just and reasonable and therefore not subject to ICC scrutiny. 49 U.S.C. § 10709(d) (Supp. V 1981). For rates above the jurisdictional threshold, the Commission generally retains its jurisdiction to make market dominance determinations and assess the reasonableness of those rates.[5]

In the Staggers Act, Congress also specifically authorized rate contracts between carriers and shippers. 49 U.S.C. § 10713 (Supp. V 1981). The ICC's jurisdiction over such contracts was strictly limited by the Act (49 U.S.C. § 10713(d)(2)(A)), and enforcement of both Staggers Act contracts and lawful pre-Staggers contracts was vested exclusively in the courts. 49 U.S.C. § 10713 (i)(2) (Supp. V 1981).

B. The Commission's Wrongful Rejection

In the wake of the Staggers Act and its newly established jurisdictional limits on the ICC, Burlington Northern Railroad Company ("BN") filed a tariff supplement to increase the unit train rate on coal from Belle Ayr, Wyoming to Council Bluffs, Iowa, effective November 1, 1981. In an accompanying Advance Justification Statement, BN presented cost evidence to demonstrate that the

---

cient to maintain an adequate transportation system. Congressional Declaration of Findings, Pub. L. No. 96-448, § 2(7), 94 Stat. 1895, 1896 (1980); *see* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 33, 38, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 3983; *see also id.* at 115-17, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4059-61; 125 Cong. Rec. S15,309 (daily ed. Oct. 29, 1979).

[5] Even above the threshold, the jurisdiction of the ICC is further limited by the Staggers Act to preclude its review of certain rates within a zone of rate flexibility. 49 U.S.C. § 10707a(e)(2) (Supp. V 1981).

proposed rate of $10.95 resulted in a revenue-to-variable cost ratio below the new Staggers Act jurisdictional threshold and therefore was not within the ICC's jurisdiction.

Iowa Power & Light Company ("IPL") was the only shipper using that unit train tariff. During the 20-day statutory notice period prior to the November 1, 1981 effective date, IPL did not challenge the rate as exceeding the jurisdictional threshold nor did it request that the tariff be suspended or investigated. By letter dated October 16, 1981, IPL sought rejection of the tariff by the ICC on the ground that the rate exceeded a pre-Staggers prescription order of the ICC. That prescription order had been based in part on IPL's claim that it had a "contract" with BN that specified the applicable rate.

The ICC asserted that it had jurisdiction over the rate because it violated a prior prescription order, and on October 30, 1981, it rejected the tariff. On review, the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's order. *Burlington Northern Railroad v. ICC*, 679 F.2d 934 (D.C. Cir. 1982). Noting BN's unchallenged claim that the rate was below the statutory threshold for Commission jurisdiction, the Court concluded that "the Commission's decision reflects an assertion of authority inconsistent with the regime established by the Staggers Act." *Id.* at 935. The D.C. Circuit held that the Staggers Act limited the ICC's jurisdiction over rate increases tendered after the effective date of the Act, notwithstanding a prior prescription order or a pre-Act rate agreement. The Court also stated that under the statute the "exclusive remedy" for any alleged breach of contract "is a court action, not an ICC proceeding." *Id.* at 941.[6]

---

[6] At the time of the D.C. Circuit decision, IPL had already filed such a court action. Iowa Power & Light Co. v. Burlington Northern Railroad, No. 81-526-B (S.D. Iowa filed Oct. 27, 1981). In its decision, the D.C. Circuit concluded that while the Commission generally

C. BN's Refiling of the Tariff

Consistent with the D.C. Circuit opinion vacating the Commission's wrongful rejection of the original tariff filing, on July 14, 1982, BN refiled the same tariff rate ($10.35) with the same effective date (November 1, 1981) and the same Advance Justification Statement demonstrating a ratio below the jurisdictional threshold set by the Staggers Act. Because BN believed the statutory 20-day notice period had passed during October 1981, the refiled tariff was made effective on one day's notice, i.e., July 15, 1982.

On July 16, 1982, IPL filed with the Commission a petition to reject the refiled tariff, alleging that it violated the notice provisions of the Interstate Commerce Act and attempted to establish retroactive rates contrary to law. By a letter-decision dated July 16, 1982, the ICC's Chief of the Section of Tariffs rejected the refiled tariff for failure to provide 20-days' notice. On appeal, the Commission, referring extensively to the D.C. Circuit's opinion, found that it should invoke its equitable powers "solely to rectify the wrong we have perpetrated on BN due to our mistaken rejection of its tariff supplement." *Burlington Northern Railroad Company—Petition for Reconsideration of Rejection*, Docket No. 38885 (served Dec. 23, 1982), *reprinted at* Pet. App. at 18a.[7] The Commission therefore allowed BN to refile the same tariff with the original effective date of November 1, 1981 and, in an abundance of fairness to IPL, required BN to provide a 20-day notice period. In addition, the Commission stated that because it was acting under its

---

must accept a rate below its jurisdictional threshold, it would "leave to the appropriate court, in this case, the United States District Court for the Southern District of Iowa, the question of any interim or final remedy for the breach of contract alleged by IPL." 679 F.2d at 942.

[7] The petition for writ of certiorari will be cited as "Pet. at ——." The petitioner's appendix will be cited as "Pet. App. at ——." This respondent's appendix will be cited as "App. at ——."

equitable powers, it would "not require IPL to pay the entire back amount immediately." *Id.* at 19a. Rather, the Commission solicited the input of the parties to establish a "reasonable payment schedule." *Id.*

In accordance with the Commission's decision, on January 20, 1983, BN refiled for the third time the same tariff ($10.95) with the same effective date (November 1, 1981) and the same Advance Justification Statement. IPL challenged the reasonableness of the rate in a protest before the ICC, alleging that the ratio produced by the rate exceeded the jurisdictional threshold and thus the rate fell under ICC scrutiny.

By decision dated February 9, 1983, the Commission denied IPL's protest and allowed the rate to take effect as scheduled without investigation. *Retroactive Rate on Coal, Belle Ayr and Eagle Junction, WY, to Council Bluffs, IA*, Suspension Case No. 70992 (served Feb. 14, 1983), *reprinted at* App. A. The Commission found that, even if it had jurisdiction, "absent contract considerations" it did not have sufficient evidence to warrant an investigation. App. at 5a.[8] Moreover, the Commission recognized that a suit to determine the validity of the alleged contract was already pending in the district court, and "judicial enforcement of a contract could ultimately override any decision that we might make with regard to maximum reasonable rate determination." App. at 4a.[9]

---

[8] The Commission decision not to investigate or suspend the rate did not preclude IPL from initiating a rate reasonableness complaint proceeding under 49 U.S.C. § 11701(b). On October 28, 1983, IPL filed such a complaint (No. 39602), claiming that "the rate accruing to BN by reason of its retroactive supplement and continuing charges exceed (sic) a just and reasonable rate under Section 10701a of the Act." Verified Complaint at 6.

[9] Indeed, the district court in the "contract" suit later found that there existed an enforceable contract between the parties, enjoined BN from breaching that contract, and ordered BN to refund monies collected in excess of the "contract rate," plus interest. Iowa Power & Light Co. v. Burlington Northern Railroad, No. 81-526-B (S.D. Iowa Dec. 28, 1988). A stay of the refund aspect of that judgment has been granted, pending appeal.

BN's tariff, with its effective date of November 1, 1981, became the governing instrument for the movement on February 10, 1983. The ICC offered IPL an opportunity to repay the amount past due over a period of time. Pet. App. at 19a. The parties thereafter submitted evidence and argument regarding payment schedules and the question of whether interest should be allowed. On June 14, 1983, the Commission issued its final order "under our duty to effectuate the mandate of the United States Court of Appeals [for the D.C. Circuit]" and ordered repayment on a schedule not to exceed 13 months, with interest at 10.5%. App. at 9a.

D. The Eighth Circuit's Decision

On August 3, 1983, the Eighth Circuit upheld the ICC's exercise of its equitable powers to correct its prior error in its December 23, 1982 decision. *Iowa Power & Light Co. v. United States*, 712 F.2d 1292 (8th Cir. 1983), *reprinted at* Pet. App. at 1a. In its decision the Court first rejected IPL's argument that the ICC's action was inconsistent with the Interstate Commerce Act:

> Nothing in the Act expressly prohibits the ICC from allowing the retroactive application of a tariff in the limited circumstances of this case; more significantly, the challenged action is consistent with the role contemplated for the ICC under the Act.

Pet. App. at 6a.

The Court also found there was no violation of the filed rate doctrine. The Court instead found the Commission's action to be fully consistent with the two considerations or purposes of that doctrine—"preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." Pet. App. at 6a-7a (quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981)).

The Court rejected IPL's contention that the ICC could not use equitable powers to correct its prior mistake. The Court discussed *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965), a parallel case involving a Federal Power Commission order, and stated:

> The action taken by the ICC in the present case is comparable to that upheld in *Callery Properties*—the Commission has acted to undo what was wrongfully done by virtue of its prior order rejecting the increased rate requested by BN.

Pet. App. at 8a.

Finally, the Court examined the Commission's action from the perspective of fairness to IPL and concluded that the Commission's action was not arbitrary or capricious.

REASONS FOR DENYING THE WRIT

The petition presents a single narrow question—whether the Interstate Commerce Commission exceeded its statutory authority in correcting its own legal error by permitting a wrongfully rejected tariff to take effect as of its original effective date. Petitioner makes no showing that this is a question of general interest in the federal or state courts, but rather argues that review by this Court is necessary because the Court of Appeals erred in sustaining the Commission's interpretation of its governing statute.

The decision below is sound. Both the Commission and the Court of Appeals fully considered the statutory framework of the Interstate Commerce Act and concluded that the policies supporting the "filed rate doctrine" were satisfied by the Commission's action in this case. Moreover, the decision below is consistent with the decisions of other courts recognizing that agencies have authority to correct legal errors identified by the courts.

I. THE DECISION BELOW IS NARROW IN SCOPE AND UPHOLDS COMMISSION ACTION CONSISTENT WITH THE INTERSTATE COMMERCE ACT

Petitioner requests that this Court review the "correctness of the I.C.C.'s action" in allowing the wrongly rejected tariff to take effect as of its original effective date. Pet. at 5. The Court of Appeals has already undertaken such a review, fully considered the arguments advanced by IPL, and concluded that "the Commission's action in the present case did not impermissibly conflict with the Interstate Commerce Act." Pet. App. at 1a. The petition identifies no legal error in that opinion sufficient to warrant further review by this Court.

Notably, the Court of Appeals sustained the action of the Interstate Commerce Commission only in "the limited circumstances of this case." Pet. App. at 6a. Those circumstances included: (1) a statutory curtailment of the ICC's jurisdiction; (2) a judicial determination that the Commission had exceeded its new jurisdictional limits in rejecting the tariff as originally filed; (3) the resubmission of a tariff in every way identical to the original rejected one; (4) the direct involvement of the only interested shipper in all prior proceedings; and (5) a full opportunity for protest on the part of that interested shipper. The ICC justified its action solely as a means of rectifying its earlier error (Pet. App. at 18a), and the Eighth Circuit sustained it solely on that ground.[10] Pet. App. at 9a.

Petitioner argues that the Court of Appeals should have held the Commission powerless to correct its own prior error. Petitioner relies on Commission precedents from early in this century indicating that tariffs and

[10] Subsequent to its action in this case, the ICC has refused to approve retroactive tariffs submitted in other circumstances. *See, e.g.*, Petition Under 49 U.S.C. 11501(c) for Review of an Order of the Railroad Commission of Texas, No. 39624 (served Jan. 12, 1984).

tariff changes should ordinarily not be given retroactive effect. These and similar cases were cited by IPL in both the ICC and the Court of Appeals.[11] The ICC explicitly distinguished them on the ground that the carrier in this case "timely published its tariff . . . and was denied implementation of its *prospective* rate solely due to our error." Pet. App. at 17a (emphasis in original). Hence, the ICC concluded, "Our action here is not inconsistent with the general rule." *Id.*[12]

Similarly, section 10761(a) of the Interstate Commerce Act and the filed rate doctrine present no bar to the Commission's action in this case. In its petition, IPL erroneously focuses on the first sentence of section 10761(a), arguing that that provision prevents the collection of a rate not technically "in effect" on the date of shipment. Pet. at 7. The Court of Appeals, however, soundly refuted this argument, stating:

---

[11] In general, these cases hold only that, as a matter of tariff interpretation, the tariff in effect when the movement originates is the applicable tariff. In Interstate Remedy Co. v. American Express Co., 16 I.C.C. 436 (1909), where a tariff was cancelled after movement had begun, the ICC decided that the privileges and conditions of the cancelled tariff continued to apply to shipments already in progress. *See also* The Transit Case, 25 I.C.C. 130 (1912).

In *In re* Through Routes & Through Rates, 12 I.C.C. 163 (1907), the ICC determined that a shipment commenced on a through bill of lading would be governed by those tariffs in effect at the start of the movement, regardless of increases or decreases filed on tariffs for portions of the movement during (or after) the trip. *See also* Central Lumber Co. v. Chicago, Milwaukee & St. Paul Railway, 18 I.C.C. 495 (1910); *cf.* S.A. Gerrard Co. v. Belt Railway, 270 I.C.C. 59 (1948).

[12] In any event, an agency may properly create an exception to a general rule to suit new and different conditions as long as the agency's reasons are fully explained. Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800, 808 (1973) (plurality opinion); *see* Borough of Ellwood City v. FERC, 583 F.2d 642, 649 (3d Cir. 1978), *cert. denied*, 440 U.S. 946 (1979).

> Although the initial sentence of section 10761(a) seemingly supports the contention advanced by IPL, we believe a reading of the provision as a whole demonstrates that it was not designed to prevent action such as that taken by the Commission in this case. The final sentence of the provision indicates that through this section Congress primarily intended to prevent carriers from discriminating among shippers.

Pet. App. at 5a (citations omitted). Because the Commission did not authorize any discriminatory departure from the tariff rate, but rather concluded that a different tariff should have been considered "in effect" during the applicable period, there was no violation of this provision.

Nor is there any inconsistency with the filed rate doctrine. The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). The Court of Appeals observed that the filed rate doctrine was designed to preserve the Commission's primary jurisdiction over reasonableness of rates and to insure that the agency is aware of the rates charged by regulated entities. Pet. App. at 6a-7a. After reviewing the facts,[13] the Court of Appeals found that "[t]he Commission's action in the present case is fully consistent with each of these underlying considerations." Pet. App. at 7a. The filed rate doctrine, designed to protect agency powers, should not be converted into a device for curtailing those powers.[14]

---

[13] *See* Pet. App. at 7a. The Commission itself noted that its primary jurisdiction was not compromised (Pet. App. at 18a), and both the Commission and IPL have been on notice of the proposed tariff increase since October 9, 1981.

[14] Indeed, courts have never viewed the filed rate doctrine as an obstacle to correction of an agency error by means of a retroactive adjustment. *See* Inland Steel Co. v. United States, 306 U.S. 153 (1939) (carriers awarded restitution for the period during which a

Finally, no conflict exists between the decision below and recent decisions of this Court. Nothing in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), precludes the Commission's decision in the instant case. The natural gas producers in that case sought to achieve higher rates through a proceeding for contract damages in state court. Because those higher rates had never been put on file with the FERC, the agency specifically opposed the state court's award of damages as an encroachment on its jurisdiction. The Supreme Court endorsed that view, holding that "[n]o court may substitute its own judgment on reasonableness for the judgment of the Commission." 453 U.S. at 577.[15] *Arkansas Louisiana* did not present an instance, such as the present case, where the agency acted to correct its own legal error after judicial review of administrative proceedings.[16]

---

temporary injunction prevented the filing of higher tariff rates); Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir. 1970) (shipper awarded restitution for the period during which a temporary restraining order prevented the filing of lower tariff rates), *cert. denied*, 402 U.S. 999 (1971); *see also* Indiana & Michigan Electric Co. v. FPC, 502 F.2d 336 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975); Ringsby Truck Lines, Inc. v. United States, 490 F.2d 620 (10th Cir. 1973), *cert. denied*, 419 U.S. 833 (1974).

[15] In its petition, IPL cites two other cases in which the filed rate doctrine was invoked to preclude courts from providing a judicial remedy inconsistent with the agency's primary jurisdiction. T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959) (Motor Carrier Act bars a common-law action for recovery of unreasonable rates); Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) (courts may not assume agency's exclusive power to declare filed rates unreasonable). Neither of these cases holds that the filed rate doctrine may be invoked to curtail the Commission's remedial powers.

[16] Moreover, in that case the Supreme Court noted that the agency could have exercised its power to grant a waiver of the notice period to permit a retroactive change in rates, but had denied the producers' application for a waiver. *Arkansas Louisiana*, 453 U.S. at 576 n.6, 578 n.8. After the Supreme Court's decision, the Court

This Court's decision in *Burlington Northern, Inc. v. United States*, 103 S. Ct. 514 (1982), also undermines IPL's argument. The Court expressly reaffirmed the Commission's primary jurisdiction over the timing of increases in tariff rates. "'The authority to determine *when* any particular rate should be implemented is a matter which Congress has placed squarely in the hands of the Commission.'" 103 S. Ct. at 521 (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981) (emphasis in original)). The Court noted that judicial interference with the tariff filing system would disrupt the delicate balance of the statutory scheme, since a shipper can challenge a tariff on file by instituting a rate reasonableness proceeding, but a carrier could not obtain a Commission ruling that its filed rate was unreasonably low. 103 S. Ct. at 521. Similarly, in the instant case, the Commission soundly concluded that BN's rate should take effect as of its original effective date, since BN could not otherwise be made whole, but IPL could challenge that rate by filing a complaint with the Commission or pursuing its contract claims in court.[17]

---

of Appeals for the Fifth Circuit reversed the FERC's ruling in this regard, and directed the FERC to grant a waiver. This result, which allowed the producers to collect retroactively a higher tariff rate, was found to be consistent with the filed rate doctrine. Hall v. FERC, 691 F.2d 1184 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 88 (1983).

[17] In fact, IPL is presently pursuing both remedies.

The district court in the contract action (see note 6 *supra*) has ruled that BN must return to IPL a substantial portion of the original refund and has approved a supersedeas bond in the amount of $8,100,000.00, calculated on the basis of a refund to IPL of the principal amount of $6,898,861.40. IPL has taken the position in the district court that "it does not agree with BN's calculation of the amount of the supersedeas bond" because it disputes BN's view that "not all of the coal shipped by Iowa Power to its Council Bluffs Unit No. 3 via BN falls within the terms of the contract between BN and Iowa Power." Response and Resistance to Motion to Stay Enforcement of Judgment Upon Appeal and for Approval of Super-

In short, this Court has twice recently analyzed in depth the filed rate doctrine. IPL is merely seeking review of whether the doctrine precludes the Commission itself from taking remedial action in the unique circumstances of this case. Since the decision below is reasonable in light of the facts, and such circumstances are unlikely to recur, little purpose would be served by reanalyzing the application of the filed rate doctrine in this case.

II. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF OTHER COURTS RECOGNIZING THAT AGENCIES HAVE AUTHORITY TO CORRECT THEIR OWN ERRORS

The decision below is rooted in an analysis of the Interstate Commerce Act and the policies applicable under that statute. In addition to discussing section 10761 (a), the Court noted that the Commission has statutory authority to award reparations to a railroad when a tariff is mistakenly suspended and pointed out that the ICC has explicit statutory powers to correct its own errors.[18] Pet. App. at 6a. Thus, it is open to question whether the decision below applies to other agencies subject to other statutory schemes.

---

sedeas Bond at 3, Iowa Power & Light Co. v. Burlington Northern Railroad, No. 81-526-B (S.D. Iowa filed Feb. 23, 1984).

In its complaint currently pending before the ICC (see note 8 *supra*), IPL challenges the reasonableness of the rate and seeks reparations covering the entire period and the entire movement to IPL's facilities at Council Bluffs.

[18] Two provisions of the Interstate Commerce Act recognize the Commission's power to correct its own errors. One provides that "[t]he Commission may change, suspend, or set aside any [commission] action on notice." 49 U.S.C. § 10324(b) (Supp. V 1981); *see* Southern Railway v. United States, 412 F. Supp. 1122, 1147 n.75 (D.D.C. 1976) (authorizing retroactive change in effective date of order). A second provision provides that:

However, to the extent that the decision below has any significance outside of the specific statutory context in which it was decided, it is fully consistent with the decisions of other courts dealing with analogous problems under different statutory schemes.

It is well established that courts possess the power to correct their own errors or to rectify agency errors. *United States v. Morgan*, 307 U.S. 183, 197 (1939); *Inland Steel Co. v. United States*, 306 U.S. 153, 156 (1939); *Arkadelphia Milling Co. v. St. Louis Southwestern Railway*, 249 U.S. 134, 145 (1919); *Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336, 346 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975); *Midwest Motor Freight Bureau v. United States*, 433 F.2d 212, 226 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). A rule that only courts could provide equitable restitution would inevitably involve a great waste of the parties' time and judicial resources for, at the conclusion of every agency proceeding in which the agency is found to be in error, the parties would be required to initiate a separate judicial proceeding to obtain relief. *See Chemical Leaman Tank Lines, Inc. v. ICC*, 593 F.2d 241 (3d Cir. 1979).

Thus, this Court has squarely held that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). IPL contends that *Callery* is inapposite because "that case depended on the specific statutory authority given to the Federal Power Commission." Pet. at 11. However,

---

The Commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances— * * *

(c) change an action of the Commission.

49 U.S.C. § 10327(g)(1) (Supp. V 1981).

Callery has not been limited to situations involving an FPC certificate. *See, e.g., Taunton Municipal Lighting Plant v. DOE*, 669 F.2d 710, 715 (Temp. Emer. Ct. App. 1982); *Moss v. CAB*, 521 F.2d 298, 304 n.10 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

In fact, federal courts have consistently held, in a variety of statutory circumstances, that agencies can correct their own prior errors. *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950 (D.C. Cir. 1983); *Plaquemines Oil & Gas Co. v. FPC*, 450 F.2d 1334 (D.C. Cir. 1971); *Skelly Oil Co. v. FPC*, 401 F.2d 726 (10th Cir. 1968); *Southern Railway v. United States*, 412 F. Supp. 1122 (D.D.C. 1976); *cf. Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 210 n.20 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).[19]

Moreover, it is precisely this principle—the need for an agency to have sufficient authority to correct its *own* errors—that distinguishes the instant case from petitions currently pending before this Court: *ICC v. American Trucking Association, cert. granted*, 103 S. Ct. 3109 (1983); *Aberdeen & Rockfish Railroad v. United States, petitions for cert. filed*, 51 U.S.L.W. 3341 & 3394 (U.S. Oct. 22 & Nov. 12, 1982) (Nos. 82-707 & 82-804). Those petitions concern the ICC's power to reject defective tariffs filed by carriers. *ATA* involves rejection of a tariff filed by a carrier which is violative of a motor carrier rate bureau agreement. *Aberdeen* involves the ICC's power to fashion appropriate relief where a carrier initially filed a tariff with improper symbolization.

---

[19] In Mississippi River Fuel Corp. v. FPC, 202 F.2d 899 (8d Cir.), *cert. dismissed*, 345 U.S. 988 (1953), the Third Circuit found that the particular circumstances did not favor retroactive adjustment, but retroactive relief was ordered by that court a year later in a case involving the filing of an erroneous rate. Mobile Gas Service Corp. v. FPC, 215 F.2d 883, 892 (8d Cir. 1954), *aff'd sub nom.* United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956).

Neither case concerns the ICC's correction of its *own* legal error, which has been identified through prior judicial review proceedings. A decision regarding the pending petitions, hence, would not clarify the issues in this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Of Counsel:
DONALD E. ENGLE
Senior Vice President
—Law & Government Affairs
NICHOLAS P. MOROS
General Counsel
—Administrative Law
BURLINGTON NORTHERN
RAILROAD COMPANY
176 East Fifth Street
St. Paul, Minnesota 55101

BETTY JO CHRISTIAN *
EDWARD R. LEAHY
CHARLES G. COLE
STEPTOE & JOHNSON
Chartered
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-2000
**Counsel of Record for Respondent Burlington Northern Railroad Company*

Dated: April 4, 1984

APPENDICES

APPENDIX A

SERVICE DATE
FEB. 14, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

Suspension Case No. 70992

RETROACTIVE RATE ON COAL, BELLE AYR AND EAGLE JUNCTION, WY, TO COUNCIL BLUFFS, IA

Decided: February 9, 1983

On January 21, 1983, the Burlington Northern Railroad Company (BN) filed Supplement 10 to its local freight tariff ICC BN 4187-B with this Commission. Supplement 10 establishes a rate of 1,095 cents per ton on coal from Belle Ayr and Eagle Junction, WY, to Council Bluffs, IA. The supplement has a general effective date of February 10, 1983, while the rate of 1,095 cents is referenced as having been in effect beginning with November 1, 1981. The tariff rate item (200-D) containing this rate is indicated as being filed under authority granted by this Commission in Docket No. 38885, *Burlington Northern Railroad Company—Petition for Reconsideration of Rejection*, decided December 9, 1982.

Also on January 21, 1983, the BN filed a memorandum and advance justification statement in connection with the said rate filing. The advance justification statement is essentially the same as the BN had filed in connection with an earlier proposal to establish the same rate in Supplement 4 to the said tariff effective November 1, 1981. Supplement 4 to tariff ICC BN 4187-B was rejected by this Commission on October 30, 1981, because the rate therein exceeded the rate level

which had been prescribed as the reasonable maximum in *Unit-Train Rates On Coal-Burlington Northern, Inc.*, 364 I.C.C. 186 (1980), *aff'd sub nom., Iowa Power and Light Co. v. Burlington Northern Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1253 (1982). The basis of that prescription was the rate level that had been agreed to by the BN and Iowa Power and Light Company (IPL) in a 1976 "letter of understanding".

BN appealed the rejection. The reviewing court held that a tariff allegedly below the market dominance threshold set forth in 49 U.S.C. 10709 may not be rejected simply because the rate exceeds the level prescribed in an outstanding order or a pre-Staggers Act agreement (*Burlington Northern Railroad Company v. ICC*, 679 F.2d 934 (D.C. Cir. 1982)). The Commission's order was vacated and the matter was remanded to this Commission.

BN subsequently filed a Supplement 8 to its tariff ICC BN 4187-B on July 14, 1982, to become effective July 15, 1982. Supplement 8 was rejected by the Chief of the Section of Tariffs on July 16, 1982. The BN filed a petition for administrative review of this decision and the petition was granted by our decision dated December 9, 1982, in Docket No. 38885. The BN was authorized to refile Supplement 8 to ICC BN 4187-B on 20 days' notice with the 1,095 cent rates being shown as effective on November 1, 1981.

Supplement 10 to ICC BN 4187-B essentially comports with the decision of this Commission in No. 38885. It is filed on 20 days' notice and it indicates that the rate of 1,095 cents (absent suspension notice or rejection by this Commission) will have been in effect beginning with November 1, 1981.

IPL filed a verified complaint and petition for suspension and investigation of retroactive rate increase and investigation of prospective rate increase on January 21, 1983, with an amendment to the petition dated January

31, 1983. IPL asks suspension of the rate insofar as it would apply retroactively beginning with November 1, 1981, and investigation (without suspension) of the rate insofar as it would apply on and after February 10, 1983. Protestant IPL has submitted a cost study purporting to show that the rate of 1,095 cents reflects 223 percent of the November 1, 1981, level variable costs and 219 percent of current variable costs. IPL alleges that the rate would be 58 percentage points above the November 1, 1981, jurisdictional threshold and 49 percentage points above the currently applicable threshold. BN disputes IPL's cost showing contending, among other things, that cost data not available in October 1981 should not now be considered in connection with this rate, and, further, that the rate is less than 165 percent of variable costs.

We have considered the issues raised by the BN and IPL in the BN's statement of justification, the IPL's complaint and petition, and the BN's reply to the said complaint and petition. We have also reviewed our position in this matter.

As indicated in our decision in Docket No. 38885, *supra*, the prescription by this Commission of a maximum reasonable level for this movement was based on the Commission's recognition of the rate level that had been agreed upon by the parties in the 1976 "letter of understanding". The question of whether there is a lawful contract between IPL and BN and the binding nature of such a contract is now pending before the United States District Court for the Southern District of Iowa. Matters of contract disputes between a shipper and a carrier are best decided by the Courts. *See* 49 U.S.C. § 10713(i)(2); *see also Burlington Northern R. v. I.C.C.*, 679 F.2d 934, 942 (D.C. Cir. 1982).

Protestant IPL has alleged that the rate of 1,095 cents per ton is far above the jurisdictional threshold and that it is unjust and unreasonable.

Using the most conservative estimate, we conclude that the rate reflects approximately 200 percent of estimated variable costs at a embedded debt level. (The 200 percent estimate reflects 1981 costs, which are undoubtedly lower than most recent costs.) Based on this conclusion the rate would be above the jurisdictional threshold.

We have decided neither to suspend nor investigate the rate. Although it arguably results in a revenue-variable cost percentage that is greater than 20 percentage points above the 170 percent revenue-variable cost currently applicable under 49 U.S.C. 10709(d), neither party has addressed the so-called "Long-Cannon factors" codified at 49 U.S.C. 10707a(e)(2)(B). Because the parties have neither addressed nor submitted evidence on these factors, we have no basis upon which to consider them. We would remind the parties, however, that their failure to raise Long-Cannon factors here does not preclude their right to do so in a subsequent complaint proceeding pursuant to 49 U.S.C. 11701(b).

IPL argues for suspension and investigation of the rate because of the high revenue to variable cost ratio. However, we have recently found to be reasonable rates which have resulted in revenue to variable cost ratios equal to, or higher than, the ratio here.

Moreover, BN is a revenue inadequate carrier. In Ex Parte No. 439, *Railroad Revenue Adequacy-1981 Determination* (not printed), served November 18, 1982, BN was found to have a return on investment of only 4.29 percent. Our most recent determination of the rail carriers' cost of capital is 16.5 percent. Ex Parte No. 415, *Railroad Cost of Capital-1981*, 365 I.C.C. 734 (1982).

Because judicial enforcement of a contract could ultimately override any decision that we might make with regard to maximum reasonable rate determination (as-

suming that the court would determine that a valid contract exists), and because the evidence before us would not, in our judgment, support a decision to institute an investigation absent contract considerations, we will deny IPL's petition and allow the rate of 1,095 cents to take effect as scheduled without investigation.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioner Andre, Simmons and Gradison. Chairman Taylor concurred with a separate expression.

AGATHA L. MERGENOVICH
Secretary

CHAIRMAN TAYLOR, concurring:

I agree with the majority's decision on the merits, since, in this instance, protestant did not introduce any evidence with regard to the Long-Cannon factors set forth in 49 U.S.C. 10707a(e)(2)(B), nor did it raise any issues concerning these matters.

As indicated in *Arkansas Power & Light Co.—Amendment—Staggers Act*, 365 I.C.C. 983 (1982), we have adopted a case-by-case approach to implementation of the Long-Cannon amendment to the Staggers Rail Act of 1980. That decision, which dealt primarily with procedures for complaint and formal investigation proceedings, stressed the availability of discovery as a means of obtaining from the railroads information relevant to the Long-Cannon factors. In view of the short time frames involved in suspension cases, some variance from a protestant's strict burden under *Arkansas Power & Light* may well be required in suspension proceedings. This is a matter I intend to examine closely in an appropriate case.

APPENDIX B

SERVICE DATE
JUNE 14, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. 38885

BURLINGTON NORTHERN RAILROAD COMPANY—
PETITION FOR RECONSIDERATION OF REJECTION

Decided: June 7, 1983

Background

In October 1981, the Burlington Northern Railroad Company (BN) filed Supplement No. 4 to Tariff ICC BN 4187-A to establish as of November 1, 1981, a base rate of $10.95 per ton for the transportation of coal to the Council Bluffs, Iowa generating plant of Iowa Power and Light Company (IPL). At IPL's request, we rejected Supplement 4 because it increased the rate above a level prescribed by the Commission in 1980. The United States Court of Appeals ruled that the rejection was contrary to the Interstate Commerce Act, in *Burlington Northern Railroad Co. v. ICC*, 679 F.2d 934 (D.C. Cir. 1982).

After the court decision, BN refiled the supplement (as Supplement No. 8) on July 14, 1982 to take effect on July 15, 1982 and to establish the $10.95 rate from November 1, 1981—the date the rate would have taken effect but for the Commission's erroneous rejection.

We rejected Supplement No. 8 on July 16, 1982, because of the failure to provide the advance notice required by 49 U.S.C. 10762(c)(3) and 49 C.F.R. 1300.14 (a)(ii) (as amended), and the failure to include a title

page notation showing authority for publication on short notice, as required by 49 C.F.R. 1300.3(h).

On appeal, the Commission allowed the railroad to refile the supplement on twenty days' notice, to take effect from November 1, 1981 (order served December 23, 1982). The Commission used equitable principles to make BN whole. It acknowledged that agency error alone had prevented BN from collecting, since November 1, 1981, the $10.95 rate. The Commission found that BN would be unable to recoup the lost revenues unless the tariff establishing the $10.95 rate took effect from November 1, 1981. The Commission directed BN to apprise it of the amount of the undercharges created by the erroneous rejection of the tariff in 1981 and directed both parties to submit suggested payment schedules.

BN then refiled the supplement (as Supplement No. 10) on twenty days' notice, and the $10.95 rate took effect on February 10, 1983, *nunc pro tunc* to November 1, 1981.

In response to the Commission's instructions, BN filed a proposed schedule for payment of undercharges and interest. BN computed the undercharges to be $8,196,697.54 for the period November 1, 1981 (the date the $10.95 rate would have taken effect but for the erroneous rejection) through February 9, 1983 (the day before Supplement No. 10 became effective). BN proposed an interest rate of 13.3 percent, resulting in $637,963.18 in interest for that period. It proposed a payment schedule of twelve monthly installments, with interest continuing to accrue on the outstanding balance at the daily rate of .0003694 percent (which corresponds to 13.3 percent per annum). The total accrued interest would be paid as a final (thirteenth) installment.

IPL agrees that the principal amount owed is $8,196,697.54. It has offered to pay this amount in two

monthly installments, but *without interest.*[1] It claims that the Commission's decision was expressly limited to the amount of the undercharges and does not permit the assessment of interest charges.

Discussion

The purpose of permitting BN's tariff to take effect in the past is to make BN whole for the revenues it should have been, but was unable, to collect. To render BN whole, IPL must pay interest to compensate for the lost use of the uncollected revenues. IPL is not penalized by the payment of interest. It is simply required to return the value of the benefit it received—the use of the money during this period.

BN proposed that the interest rate used be the average yield of marketable securities of the United States government having a duration of 90 days. This is the formula prescribed in 49 U.S.C. 10707(d) for computing, after a Commission investigation of a proposed rate, any appropriate refunds or undercharges (depending on whether or not the proposed rate had been suspended pending the investigation) to reflect the outcome. BN would use the average yield on October 16, 1981—the date of IPL's original letter to the Commission requesting rejection of the tariff supplement—as the rate applicable to shipments throughout the entire period. It would apply a 13.3 percent[2] interest rate to the number of days from

---

[1] IPL argued that if interest is assessed, it should receive the same rate of interest, to the date of payment of the retroactive amount, if it prevails in any future proceeding before the Commission for reparation for unreasonably high rates for the shipments during this November 1, 1981 through February 9, 1983 period. IPL has not filed such a claim. We need not consider its argument before we receive and rule on any such claim.

[2] Our analysis shows that 13.52 percent was the average yield on October 15, 1981. No new bills were issued on October 16, 1981. The yield on October 29, 1981, the auction date closest to November 1, was 13.35 percent.

each shipment's waybill date excluding Saturdays, Sundays, holidays, and the five-day credit period allowed by Commission rule.

We find the use of the 90-day marketable government securities rate acceptable here, since it has been legislatively prescribed for use in a closely analogous context. However, we do not approve of the selection of the October 16, 1981 date for calculating the rate. IPL owes no money to BN for any date prior to November 1, 1981 —the date the $10.95 rate was first scheduled to go into effect. Moreover, in an era of declining interest rates, to apply the rate in effect at the beginning of the period to all shipments made thereafter could disadvantage IPL unfairly.

Accordingly, we have determined that the average yield for the period November 1, 1981 through February 9, 1983 is 10.5%. Using this rate, we authorize BN to calculate the interest owed for this period.

Since BN will be compensated for any further delay through the payment of interest, IPL may determine whatever payment schedule best fits its needs. However, it should not extend the payments beyond the thirteen-month period which BN has proposed and which we find to be reasonable. When IPL establishes a schedule, BN shall promptly calculate the interest that has and will accrue under that schedule. IPL shall then pay according to that schedule.

We issue this order under our duty to effectuate the mandate of the United States Court of Appeals in *Burlington Northern Railroad Co. v. ICC*, *supra*, and under equitable principles that allow us to remedy the effects of our prior mistakes.

This decision will not affect the quality of the human environment or the conservation of energy resources.

It Is Ordered:

1. IPL shall pay the outstanding principal balance for this period November 1, 1981 through February 9, 1983: $8,196,697.54.

2. IPL shall establish a payment schedule no lengthier than thirteen (13) months.

3. Interest has and will accrue on the outstanding principal balance according to the principles discussed above.

4. Upon the establishment of a payment schedule, BN shall calculate the exact amount of interest owed according to the principles discussed above.

5. IPL shall pay the amount of principal and interest promptly according to the schedule established.

6. This decision will be effective upon the date of service.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

[SEAL]

AGATHA L. MERGENOVICH
Secretary

(THIS PAGE INTENTIONALLY LEFT BLANK)

No. 83-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IOWA POWER & LIGHT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

Of Counsel:
LYNN K. VORBRICH
Iowa Power and Light Company
666 Grand Avenue
Des Moines, Iowa 50309

CURTIS L. RITLAND
1100 Des Moines Building
Des Moines, Iowa 50307

JOHN M. CLEARY
*FREDERIC L. WOOD
NICHOLAS J. DIMICHAEL
914 Washington Building
1435 G Street, N.W.
Washington, D.C. 20005
Tel. (202) 783-1215

*Counsel of Record
for Petitioner

DATE: April 17, 1984

ABS Duplicators • 912 Seventeenth St. NW, Wash. DC • 298-5537

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1080

IOWA POWER & LIGHT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR PETITIONER

Pursuant to Rule 22.5 of the Rules of this Court, petitioner Iowa Power and Light Company submits this reply brief responding to the arguments first raised in the briefs in opposition.

REPLY ARGUMENT

The respondents, like the court of appeals, fail to grasp the broad scope of the statutory requirement that the effective tariffs be strictly observed. The court of appeals

focused improperly on the need to prevent rebates. But that is only part of the purpose of the statute, as may be seen by reference to the antecedents of the present version of §10761(a). As this Court said in *Pennsylvania R. Co. v. International Coal Co.*, 230 U.S. 184, 196-97 (1913), it is just as much contrary to the statutory tariff regime for a carrier to seek to apply retroactively rates above the tariff rates in effect when the transportation takes place as it is for the shipper to seek rates below the tariff level. The broad scope of this requirement can be readily understood by reference to the relevant language of the statute before its recodification:

> No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a *greater or less* or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and *in effect at the time;* nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. Feb. 4, 1887, c. 104, Pt. I, § 6, 24 Stat. 380; Mar. 2, 1889, c. 382, § a, 25 Stat. 855; June 29, 1906, c. 3591, § 2, 34 Stat. 586; Feb. 28, 1920, c. 91, § 411, 41 Stat. 483; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

49 U.S.C.A. § 6(7) (1959) [emphasis added]. The requirement for strict observance of the tariff "in effect at the time" is set apart by a semi-colon from the portion of the statute prohibiting rebates. Thus, it is obvious that the Congress intended to prohibit railroads (and other carriers) from charging either *more than* or less than the tariff rate in effect at the time the transportation service is provided.[1] It is just as unlawful for a carrier to practice a discrimination *against* a shipper by seeking afterwards to charge a higher rate than that specified in the effective tariff as it is for the carrier to practice a discrimination *in favor of* a shipper by allowing him to obtain a lower rate than that specified in the effective tariff.[2] Contrary to

---

[1]Any doubts about the scope of the statutory language must be resolved by reference to the provisions before modification (Pub. L. 95-473, 92 Stat. 1337), which was intended to revise and recodify the Interstate Commerce Act "without substantive change." *Water Transport Association v. I.C.C.*, 715 F.2d 581, 590 (D.C. Cir. 1983), cert. den. ____ U.S. ____, 104 S. Ct. 998 (1984), and *Shippers Nat'l Freight Claim Council v. I.C.C.*, 712 F.2d 740, 742, n. 2 (2d. Cir., 1983).

[2]See *Interstate Grain Co. v. Chicago & N.W. Ry. Co.*, 22 I.C.C. 34, 35 (1911) (". . . under the act to regulate commerce it is as unlawful for a carrier to overcharge a shipper as to give him a rebate."); *Refrigerator and Butcher Supply Co. v. Illinois Cent. R. Co.*, 20 I.C.C. 64, 65 (1910) ("It is the plain duty of the carriers to collect no more than the published rate; to do otherwise is a crime for which indictment will lie and for which there is serious punishment provided in the law against both the carrier and its agent."); *Tyson and Jones Buggy Co. v. Aberdeen & A. Ry. Co.*, 17 I.C.C. 330, 332 (1909) (". . . the retention by a carrier of an overcharge not only has all the effects of an unjust discrimination against the shipper from whom the excess has been demanded, but leaves the transportation transaction in an unlawful condition, both under the act to regulate commerce and the Elkins Act. . .") and *Phelps & Co. v. Texas & P. Ry. Co.*, 6 I.C.C. 36, 50 (1893) (". . . the retention of an overcharge has all the effect of unjust discrimination against the person from whom payment has been required. . . .").

respondents' assertions (Federal respondents brief p. 6; BN brief, p. 11), Iowa Power is seeking protection from the discriminatory application of retroactive rates.

The court of appeals and the I.C.C. both failed to recognize the scope of the statutory requirement that tariffs be strictly observed. In that regard, the actions below are unprecedented, and are of significant importance, not just because of their substantial impact on petitioner Iowa Power,[3] but because of the significance of the potential of using retroactive tariffs in all federal regulatory statutes which utilize a tariff regime.[4]

Respondents continue to argue, as they did below, that this Court's decision in *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965) carves out an exception to the general rule that the filed tariff in effect at

---

[3]The suggestion in the Federal respondents' brief (pp. 5-6) that the issue may be irrelevant to Iowa Power (a contention not echoed by respondent Burlington Northern) is plainly wrong. As stated at page 4 of the petition, BN takes the position that the refund award in the contract litigation would apply to only a portion of the retroactive charges collected, leaving $3,901,359.88 at issue. Of course, if BN pursues its appeal from the district court (docketed as No. 84-1292-JI in the U.S. Court of Appeals for the Eighth Circuit) and prevails, then the entire amount of the retroactive charges collected ($9,067,065.26) is at issue.

[4]Provisions requiring filing and observance of tariffs are found in the Natural Gas Act (15 U.S.C. §717c(c)), the Federal Power Act (16 U.S.C. §824d(c)), the Federal Communications Act (47 U.S.C. §203(c)), the Shipping Act of 1916 (46 U.S.C. §817), as amended, and the Packers and Stockyards Act (7 U.S.C. §207(f)). Of course, the provisions at issue here also apply to non-railroad transportation carriers (motor carriers, water carriers and freight forwarders), and the provisions of the Interstate Commerce Act before recodification still apply to oil pipelines. (See Sec. 4(c), Pub. L. 95-473, 92 Stat. 1470 (1978)). Respondents have cited no cases in which a retroactive tariff has been permitted under these provisions.

the time the service is provided must be strictly observed. They base this argument on the view, contrary to this Court's decision in *Southern Pacific Co. v. I.C.C.*, 219 U.S. 433, 442-444, 451-452 (1911), that the I.C.C. may exercise equity power in the administration of the Interstate Commerce Act.

This case must be distinguished from those cases relied on by respondents where the courts may exercise their own equity powers to restore situations created by prior exercise of equity jurisdiction by the courts.[5] Even in those situations, the statutory provisions of the Act can be a limitation on the exercise of the general equity authority by the courts. *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 311-317 (1935).[6]

Nearly all of the other cases cited by respondents for the proposition that an agency may correct its own errors did not involve tariffs.[7] But the one case which did involve

---

[5]E.g., *United States v. Morgan*, 307 U.S. 183, 197 (1939), quoting *Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134, 146 (1919) ("inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done *by virtue of its process.*" [emphasis added]) To the same effect are *Inland Steel Co. v. United States*, 306 U.S. 153 (1939) and *Middlewest Motor Freight Bureau v. U.S.*, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

[6]In a case relied on by respondent BN (brief, pp. 12 and 15), *Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336, 344-348 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975), the court specifically modified its decree to avoid imposing retroactive liability on the utility's customers.

[7]Cases such as those cited by respondent BN (brief, p. 16) involved licenses for hydroelectric dams (*Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 203 (4th Cir. 1967), *cert. denied*, 390 U.S. 495 (1968)) contracts or contract rates (*Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 950 (D.C. Cir. 1983), *Southern Ry. Co. v.*

(continued)

tariffs (*Moss v. C.A.B.*, 521 F.2d 298 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 966 (1976)) was not presented with the question of whether a retroactive tariff would be permissible.[8]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
LYNN K. VORBRICH
Iowa Power and Light Company
666 Grand Avenue
Des Moines, Iowa 50309

CURTIS L. RITLAND
1100 Des Moines Building
Des Moines, Iowa 50307

JOHN M. CLEARY
*FREDERIC L. WOOD
NICHOLAS J. DIMICHAEL
914 Washington Building
1435 G Street, N.W.
Washington, D.C. 20005
Tel. (202) 783-1215

*Counsel of Record
for Petitioner

DATE: April 17, 1984

---

[7](continued)
United States, 412 F. Supp. 1122, 1127 (D.D.C. 1976)), certificates with conditions (*Plaquemines Oil and Gas Co. v. FPC*, 450 F.2d 1334, 1335 (D.C. Cir. 1971) and *Skelly Oil Co. v. FPC*, 401 F.2d 726, 727 (10th Cir. 1968)), or direct regulation (without tariffs) of oil prices (*Taunton Mun. Light. Plant v. DOE*, 669 F.2d 710, 711 (Temp. Em. Ct. of App. 1982)).

[8]While denying, on the authority of *T.I.M.E Inc. v. U.S.*, 359 U.S. 464 (1959) [relied on by petitioners], any right of the CAB to award reparations the court did seem to suggest that, if a rate was shown to be unreasonable, that a *court* could later award restitution. 521 F.2d at 307, n. 19.